

THE *Bge*
Modern Practice

OF THE
High Court of Chancery,
METHODIZED AND DIGESTED
IN A MANNER WHOLLY NEW,

Interspersed with Variety of the most approved and modern
Forms of PRACTICAL PRECEDENTS incidental to
every Suit in the Progress of it, from the original Bill to
the Decree:

COMPRISING
A SYSTEM OF PRACTICAL KNOWLEDGE,
According to the Course of the COURT as at present
established;

By ROBERT HINDE,
Of Lincoln's-Inn, Esq;

LONDON:
PRINTED BY HIS MAJESTY'S LAW PRINTERS;
FOR E. BROOKE, BELL-YARD,
NEAR TEMPLE-BAR.

MDCCLXXXV. *B*



TO
THE RIGHT HONOURABLE
E D W A R D
L O R D T H U R L O W,
BARON THURLOW OF ASHFIELD,
IN THE
COUNTY OF SUFFOLK,
LORD HIGH CHANCELLOR
OF
G R E A T B R I T A I N.

M Y L O R D,

I Have in the following Work attempted to digest and elucidate the various Branches of Proceedings in that Court where you most honourably preside ; I have added to them numerous Resolutions and Determinations, to shew upon what Grounds most of those Proceedings are established and supported. My Endeavours have been to render the Practice of the Court more easy, by making it better

DEDICATION.

and more readily known; and I flatter myself that your Lordship, who is always disposed to encourage every useful Design, will pardon my Errors and Defects for the Sake of my Intention. If this Performance should find a favourable Reception from your Lordship, my Ambition will be gratified, and my Pains and Attention in compiling it fully recompenced by the Honour which your Lordship's Approbation will confer on

My Lord,

Your Lordship's most devoted

and obedient humble Servant,

ROBERT HINDE.

*Lincoln's-Inn,
Nov. 28th, 1785.*

Of the Original Bill.

A Party remediless by the rules of the common law, or whose relief lies only in conscience, institutes a suit on the equity side of this court, by preferring a bill in the stile of a petition, directed ordinarily to the Lord Chancellor, Lord Keeper, or Lords Commissioners for the custody of the great seal of *Great Britain*, or to the King's most excellent Majesty, in his high court of Chancery, in case the person holding the seals is a party † or the seals are in the King's hands ‡. The bill must shew how, by whom, and in what the complainant is aggrieved or injured; and from which it is the peculiar office of a court of equity to relieve the sufferer, praying relief, according to the injury; or without praying relief against an injury suffered, it may seek a discovery of matter necessary to support or defend an action at the common law; or although no actual injury be suffered it may complain of a threatened wrong, and, stating a probable ground of possible injury, may pray the assistance of the court to enable the person complaining to defend himself against the injury whenever it should be attempted to be committed ||.

A suit thus instituted on the equity side of the court of Chancery, is termed a suit by *English bill*, in contradistinction to the proceedings instituted on the ordinary jurisdiction

† 4 Vin. Abr. 385. L. Leg. Jud. in Ch. 44. 255, 258. Jud. Auth. M. R. 182.

‡ Prac. Reg. 24. West. Symb. 194. b.

|| Preced. in Chan. 531. 1 Atk. 284.

Of the Original Bill.

of the court, which till the 4 Geo. 2. were entered and inrolled in Norman French, and afterwards in Latin, as were the proceedings in the common law courts. And this suit by English bill in times of the remotest antiquity always was in the English language.

Of Parties to the Suit.

THE bill must call all necessary parties, who may be affected by the demand, before the court; for if upon the face of the bill it appears that any whose right or interest are concerned, or who ought to have been, are not made parties thereto, the defendant may demur to such bill; or if he does not, yet the court, upon hearing, will not, for want of them, proceed to a decree; or if it does, the decree may be reversed; or if it be not reversed, yet none but such as were parties to the suit, and those claiming under them, can be bound by the decree.

All bodies politic and corporate, and all persons of full age, not being *femes covert*, *idiots*, or *lunatics*, are by themselves capable of exhibiting a bill of complaint in the court of Chancery, excepting only the King and Queen. The Queen consort may sue alone, so may a Queen dowager, though married. 2 Inst. 50. Co. Lit. 133. The disabilities arising from outlawry, excommunication, conviction of popish recusancy, attainder and alienage, do not absolutely disable the person suffering under them from exhibiting a bill. Outlawry, excommunication, and conviction of popish recusancy are not in some cases any disability, and where they are a disability, if it be removed by reversal of the outlawry, by purchase of letters of absolution in the case of excommunication, or by conformity in the case of a popish recusant, a bill exhibited under the disability may be proceeded upon. Attainder and alienage no otherwise disable a person to sue, than as they deprive him of the property which is the object of the suit. Villenage and profession were in the same predicament. Suits in respect to rights of the crown, or of those for whom it is a trustee,

trustee, are carried on in the name of the King's Attorney or Solicitor General. See *tit. Information*. The persons incapable by themselves of instituting a suit, are *infants, feme coverts, and lunatics*.

When an *infant* claims a right or suffers an injury, on account of which it is necessary to resort to the extraordinary jurisdiction of this court, his nearest relation is supposed to be the person who will take him under his protection and institute a suit to assert his rights, or to vindicate his wrongs. The person who institutes a suit on behalf of an infant, is therefore termed his next friend, but as such nearest relation may be the offending party, the court, in favour of infants, will permit any person, without their consents, to institute suits on their behalf, and such person is stiled the next friend of the infant, and named as such in the bill. 1 *Atk.* 570. *Mos.* 47. 86. The *prochein amy* is liable to costs of suit if it be determined against him.

A bill may be brought on behalf of an infant *en ventre sa mere*, and an injunction to stay waste may be obtained 2 *Vern.* 711.

If there be a mistake by an offer of an infant in his bill, the court will take care of him, and direct an amendment of the bill. 2 *Wms.* 386.

If an infant be sued, the court will appoint a guardian to defend him.

A *feme covert* being *sub potestate viri*, any right accruing to her must be sued for in the joint names of husband and wife, unless it be some right claimed by her in opposition to rights claimed by her husband, and in such case she must exhibit her bill by her *prochein amy*; and there is this distinction between a *prochein amy* to an infant and a *prochein amy* to a *feme covert*, that in the latter case no person can exhibit a bill in her name without her consent. *Preced. in Chan.* 376.

A *feme covert* who has a separate maintenance may sue alone. 1 *Chan. Ca.* 35.

So may a wife whose husband is banished by act of parliament, and may act in every thing as a *feme sole*. 2 *Vern.* 104.

A *feme covert* must answer alone, if the husband be not amenable. *Eq. Ca. Abr.* 65. *pl.* 8. *Preced. in Chan.* 328.

Upon the affidavit of a *feme covert* that the bill was brought without her consent, it shall be dismissed. *Eq. Ca. Abr.* 72. *Preced. in Chan.* 376.

Idiots and lunatics, after an inquisition returned finding them such, sue and answer by the committees under the grant of their persons and estates made by the Lord Chancellor, Lord Keeper, or Lord Commissioners for the custody of the great seal. Sometimes informations are exhibited by the Attorney General on behalf of both idiots and lunatics. *1 Chan. Ca.* 112. 153.

If the lunatic be not named a party in the bill or information by the Attorney General, it is commonly good cause of demurrer. *1 Chan. Ca.* 153. *secus* of an idiot.

But if the bill in nature of an information be to be relieved against some act done during his lunacy, he must not be named a party, for that were to stultify himself. *1 Chan. Ca.* 113.

If the suit be for a lunatic, the committee, as well as the lunatic, shall be made parties. *Ca. Ch.* 19.

If all proper persons be not made parties to the bill, any other shall be added upon motion. *Prac. Reg.* 29.

The King may sue here for equity; or the Chancellor himself; but he shall not make a decree in his own cause. *1 Roll.* 373. *Lane's Rep.* 48.

If there be a bill against the executors of one obligor for discovery of facts, all the obligors shall be joined; for the charge ought to be equal. *2 Ventr.* 348.

Bill for payment of money upon bond must be against all the obligors, or else there can be no decree. *2 Freem. Rep.* 127.

If a debt be joint and several, each of the debtors must be brought before the court, because they are intitled to each others assistance in taking the account, and likewise to contribution: so on specialty, heirs and executors must both be made parties. *3 Atk.* 406. *Madox v. Jackson.*

But

But if there are principal and sureties, the principal cannot object that the sureties are not parties. And if a bill be brought against principal and one surety, and it is admitted the other is dead insolvent and no personal assets at all, his representatives need not be made parties. *Ibid.*

If the suit be by one surety against another for contribution, supposing that *A.* another surety is dead insolvent, the executors of *A.* ought to be a party. *Rep. temp. Finch* 15.

The Attorney General need not be a party to a suit relating to a private charity, such as a voluntary society to provide for the members and their widows, by weekly contributions. *Anon.* 3 *Atk.* 277.

If there are two lessees, and one brings bill for apportionment of rent, the other lessee must join as plaintiff, or be made defendant, or the bill will be dismissed with costs. *Stafford v. City of London.* *Str.* 95.

Where a bill is brought for surrender of a copyhold estate held for lives, the Lord must be made a party; because when the surrender is made the estate is in the Lord, and he is under no obligation to new grant it. *Contra* in case of copyholds of inheritance; for then the Lord need not be made a party. *Eq. Ca. Abr.* 167. *pl.* 15.

Bill to recover 100*l.* *per annum* agreed to be paid by a vestry order made by defendants and others, parishioners, for a yearly lecture, because it appeared all the parties to the order were not defendants, and those who were, had paid their proportions, plaintiff could have no decree. *Hardr.* 333.

If there be a covenant by a patentee to pay a rent to *B.* and the right of *B.* to the payment be dubious, in a bill by *B.* the Attorney General should be made a party; otherwise if the covenant be in affirmance of a prior right of *B.* *Hard.* 181.

Bill for relief touching a lease for years, or personal duty against an executor in trust, the *cestui que trust*, or the residuary legatee, need not be parties. 1 *Vern.* 261. *Anon.* *sed quære.*

Bill to redeem, defendant in his answer sets forth he was trustee for A. bill dismissed at the hearing, for that *cestui que trust* ought to have been party, and might have been added by amendment, it being disclosed by the answer. *Bunb. 53.*

A *cestui que trust* must in all cases be made a party, but the trustee needs not, especially if *cestui que trust* undertakes for him. *Preced. in Chan. 275.*

A trustee for three persons is called to an account; all the *cestui que trusts* must be made parties, otherwise he might be called to account thrice for the same matter. *1 Vern. 110. Hanne v. Stevens.*

If the suit be by the assignee of a legacy, the executor ought to be a party; and it is not sufficient to say that he consented. *1 Ca. Chan. 277.*

The owner of the inheritance must be made party to a bill to establish a custom. *Spendler v. Potter. Bunb. 181.*

If it be for relief against an assignment of a bail-bond by the sheriff by fraud, the plaintiff in the action ought to be a party. *1 Vern. 87.*

If an ancestor has agreed for purchase of particular lands, and dies before it be completed, and heir at law brings bill against devisees, who claim the real estate of the ancestor by a will made before the purchase, the vendor must be a party, if his title be doubtful; otherwise, if it be clear. *Green v. Smith. 1 Atk. 572.*

The heir at law need not be made a party to a bill brought by a devisee to redeem a mortgage, unless he claims to have the will established. *Lewis v. Nangle. 2 Vez. 431.*

A mortgagee who has assigned without the mortgagor's joining, need not be made a party in the suit to redeem, *Hill v. Adams. 2 Atk. 39.*

A remainder-man expectant upon an estate-tail need not be made party to a bill one end of which is to impeach a settlement, because such remainder-man is not regarded in equity, neither can he be bound, *Eq. Ca. Abr. 2 vol. 166, p. 8.*

If a remainder-man in tail brings bill against tenants for life to have the title-deeds brought into court, and there are annuitants on the reversion, and others who have an interest under a trust term, they must be parties. *Pyncent v. Pyncent.* 3 *Atk.* 571.—The court is not inclinable to order family deeds to be brought into court, unless it appears that the tenant for life is destroying them to better his title. If trustees have not conveyed the legal estate, they cannot be compelled to convey it, after they have notice of equitable charges, till the parties intitled are brought before the court. *Ibid.* 1 *Will.* 179.

If a mortgagee who has a plain redeemable interest makes several conveyances in trust to intangle affairs, it is not necessary to make all the persons who have an interest in such trust parties. But where the redemption depends on equitable circumstances, and the mortgagee in fee has made an absolute conveyance, with limitations and remainders over, the first tenant in tail must be a party. *Yates v. Hambley.* 2 *Atk.* 237.

In a bill for execution of a trust, and will for payment of debts, and settling an estate on the several branches of a family, it is necessary to make the first in being intitled to an estate of inheritance a party *Finch v. Finch.* 2 *Ves.* 491.

A. tenant for years, remainder to *B.* for life, remainder to *C.* in fee, *A.* commits waste, *B.* though he cannot bring an action of waste, as not having the inheritance, yet is intitled to an injunction, if the remainder-man or reversioner be made party. *Mollineux v. Powell.* 3 *Wms.* 268. *in notis.*

Where there is a clear tenancy in tail, there is no occasion for the remainder-man's being a party to a bill of foreclosure; but if there is an express estate for life, the remainder-man ought to be a party. 2 *Atk.* 101. *Sutton v. Stone & al'.*

All executors must sue and be sued jointly. 3 *Chan. Rep.* 92. *Offey v. Jenney and another.*

No good cause of demurrer that an executor is not a party, when plaintiff alledges in his bill he knows not who

is executor, and prays defendant may discover him. *Bowyer v. Covert.* 1 Vern. 95.

Although an executor does release, he must be made a party. *Smithby v. Hinton.* 1 Vern. 31.

Upon a bill for a specific performance of a covenant under hand and seal with *A.* for the benefit of *B.* *A.* must be a party to the suit. 2 Vern. 36. *Cooke v. Cooke.*

If plaintiff at the hearing waives the relief he prays against a particular person, that person's not being a party is of no weight. *Pawlet v. Bishop of Lincoln.* 2 Atk. 296.

On a bill for an account of fees to establish a right, all persons who have any pretence to a right must be before the court; for all will be bound by a decree, though at law a judgment for fees does not bind a third person. *Ibid.*

If you draw the jurisdiction out of a court of law, you must have all parties before the court who are necessary to make the determination compleat, and to quiet the possession; therefore if lessee brings a bill to have an obstruction to his way removed, and to be quieted in possession, the lessor owner of the inheritance must be before the court. *Poore v. Clark.* 2 Atk. 515.

A decree against the lord of a manor will not bind copyholders in fee, or freeholders for life who are no parties to it. *Ibid.*

If *A.* be appointed executor *durante minore etate* of *B.*, *A.* must be made a party to a bill brought after *B.* is of age for a demand on the estate of testator, unless *B.* has received the whole from *A.* on an account stated. *Glas v. Oxenham.* 2 Atk. 121.

A covenants for himself and his heirs, that a jointure house shall remain to the uses of the settlement; the jointress brings a bill against the heir for a performance; the defendant demurs, for that the executor ought to be made a party: resolved that though at law the creditor may sue the heir only where the heir is expressly bound; yet as the personal estate is the natural fund to pay all debts, and as the executor may make it appear that he has performed the covenant, the executor must be made a party in equity. 3 Wms. 331. *Knight v. Knight.*

In a bill brought by a mortgagee against the heir of a mortgagor to foreclose, it was objected that the executor of the mortgagor ought to be a party, because it did not appear but that he might have paid the debt. *Per cur'*. There is no necessity for making the executor of the mortgagor a party; because the bill being only to foreclose the equity, the plaintiff need only to make him party who has the equity, viz. the heir. Neither is the plaintiff the mortgagee bound to intermeddle with the personal estate, or to run into an account thereof; and if the heir would have the benefit of any payment made by the mortgagee or his executor, he must prove it. *Duncombe v. Hansley, in notis. Ibid.*

On a bill against the heir of a mortgagee to redeem, and the executor or administrator not being party, on this exception taken at the hearing, the court would not proceed. *2 Freem. Rep. 52. Anon.*

A person who acts ministerially only, cannot be the sole defendant (as the treasurer of the commissioners for building the fifty churches, but rather the commissioners only). *Vernon v. Blackerly. 2 Atk. 144.*

The representatives of the undertakers for briefs who are dead need not be brought before the court; for they are each answerable the one for the other, and are to be considered as one body. *Ex parte Angel. 2 Atk. 162.*

Where the whole equitable interest is assigned over, it is not necessary in every case to make a person who has the legal interest a party. *Brace v. Harrington. 2 Atk. 235.*

But if the obligee assigns a bond, and the assignee after twenty-two years silence brings a bill, the representative of the obligee should be a party. *Ibid.*

A bond creditor may bring a bill against an executor for discovery of assets and for satisfaction, without making all other bond or superior creditors parties; for the court only decrees an account, and the executor may set forth the debts. *Anon. 3 Atk. 572.*

It is not necessary to make creditors parties to a suit for a legacy, the executor is sufficient. *Peacock v. Monk. 1 Ves. 127.*

A legatee of a term sued for it, but made not the executor party; and therefore the bill was not good, though the executor to the legacy was alledged in the bill to consent by the plaintiff's assignee of the legacy. *Moor v. Blagrove*. 1 *Chan. Ca.* 277.

Bill was for an account and delivery of a box, in custody of defendant, containing jewels, and a note in these words, "Jewels belonging to the Duke of *Devonshire* in "the hands of Mr. *Saville*," whose representative plaintiff was, and in whose possession they had been many years. Objection, that the Duke's representative was not party, and because no mention was made of an assignment to *Saville*. Objection over-ruled; pawnee of a pledge may bring *trover* or *detinue* at law without troubling himself with the pawner, for he has a special property. *Saville v. Tancred*. 1 *Ves.* 101.

If husband tenant for life, remainder to his wife for life, bring bill to know if certain lands are included in the settlement, the wife must be a party. *Herring v. Roe*. 1 *Atk.* 290.

Bill by an heir for discovery of the money of *A.* with which a trustee purchased an estate, the executor of *A.* need not be made a party. *Ch. R.* 4, 5.

If creditors bring bill to compel the sale of lands decreed to pay debts, the heir should be a party; but if the lands have been long enjoyed under the will, a sale may be decreed, though the heir be not party. *Harris v. Ingledewe*. 3 *Wms.* 91.

If the trust to pay debts be created by deed, the heir need not be made a party, unless he is to have the surplus. *Ibid.*

If there be an equitable charge on a copyhold estate, and the legal estate of the copyhold had descended to the heir, that would have made it necessary that the heir should be a party, because otherwise the legal estate of the copyhold could not be conveyed to a purchaser; but if it had happened that the heir at law had, since the testator's death, conveyed away all the copyhold estate, then the grantee of the heir being capable of conveying to the purchaser, it might

not

not be necessary to make the heir a party. *Harris v. Ingledewe.* 3 *Wms.* in *notis.*

The heir at law must be made a party to a bill on the statute of fraudulent devises. 3 *Wm. & M. c.* 13. *Warren v Stawell*, 2 *Atk.* 125.

In a bill for an account of personal estate it is not sufficient that the person who has a right to administer is a party, he must have taken out administration. *Humphreys v. Humphreys.* 3 *Wms.* 349. *sed contra Cleland v. Cleland.* *Preced. in Chan.* 64.

When an executor before probate files a bill, and afterwards proves the will, such subsequent probate makes the bill a good one. 3 *Wms.* 350. *Humphreys v. Humphreys.*

If personal estate be given to a bastard, and executors are made to take care of the child and do it justice, and it dies intestate without wife or issue, the executors may sue for the testator's personal estate, without making the Attorney-general or the administrator of the bastard, parties; for the executor has the legal title. *Jones v. Goodchild.* 3 *Wms.* 33.

None shall be made a defendant merely to pray costs against him: as if *A.* purchases a sailor's prize-money, and assigns to *B.* and the sale is set aside for fraud, *A.* cannot be made a party. *Jaylour v. Rockford.* 2 *Ves.* 281.

If bill be brought charging forgery in a lease, and mentioning, by way of inducement, fraud in trustees, who are not made parties, and relief prayed against the forgery only, and there has been a decretal order and a trial of the forgery; the cause coming on upon the equity reserved shall stand over, and plaintiff bring supplemental bill charging the fraud and making trustees parties. *Jones v. Jones.* 3 *Atk.* 110.

A supplemental bill, properly so called, is a bill brought for new matter since the original filed, and before the hearing, and the defendants in the original must be parties to the supplemental; but if the objection for want of parties be not made at the hearing, it cannot be made when the cause comes on again. *Jones v. Jones.* 3 *Atk.* 217.

After

After an account decreed, if during the account a party die, a bill to bring the devisee of such party, or other formal party (as a trustee) before the court, is not a supplemental bill, but a supplemental bill in the nature of a bill of revivor, and the defendants in the original bill need not be parties. *Ibid.*

In bills of discovery you should make every person party who is necessarily to be made so, to avoid multiplicity of suits, and you may join heir and executor; but it is otherwise at law, for there they may demur. 2 *Atk.* 51. *Plunket v. Penfon.*

A bill of discovery of real assets may be brought against an heir, in order to preserve a debt, without making an administrator of the personal estates a party, where you suggest that the representation is contesting in the ecclesiastical court. *Ibid.*

An administrator, though insolvent, must be a party to a bill for discovery of assets. 2 *Atk.* 51. *Ashhurst v. Eyre.*

To a bill for relief, all parties necessary to the relief must be made parties, or defendant may plead to such a bill *secus*, where a discovery only is wanted. 2 *Eq. Ca. Abr.* 170. p. 28. *Sangora v. The East India Company.* They only are defendants to a bill against whom process is prayed. 1 *Wms.* 593. *Fawkes v. Pratt.*

Where an executor in trust was outlawed, and a witness proved he had inquired after but could not find him, this was thought to be a full answer to an objection that such executor was not made party to the suit. *Heath v. Percival.* 1 *Wms.* 684.

The grantee of a rent-charge must make all the purchasers parties. And if two or more have a joint interest, regularly they must be all parties. So if two or more be liable to a demand, you cannot prove against one alone. So all executors, trustees, or their representatives are to be made parties. But this rule may be dispensed with if any of them be not amenable, or if they have stood out process to a sequestration.

The secretary and book-keeper of the East India Company were made defendants to a bill for a discovery of some entries and orders of the Company; the defendants demurred, for that they might be examined as witnesses; also because their answer cannot be read against the Company; the demurrer was over-ruled, lest there should be a failure of justice in regard the Company are not liable to a prosecution for perjury, though their answer be never so false.

3 P. Wms. 310. *Wych v. Neal*.

It is a general rule that no one need be made a party against whom if brought to a hearing the plaintiff can have no decree: Thus a residuary legatee need not be made a party, and for the same reason in a bill brought by the creditors of a bankrupt against the assignees under the commission the bankrupt himself need not be made a party—tho' with regard to making the bankrupt a party, it seems formerly to have been held otherwise. 2 Vern. 32. *Ibid.* in notis.

Where a bill wants proper parties, it is in the power of the court to dismiss the bill *sans* prejudice, or to give leave to amend, paying costs. *Stafford v. City of London*. 1 Wms. 428.

All persons concerned in the demand, or who may be affected by the relief prayed, ought to be parties if within the jurisdiction of the court. *Preced. in Chanc.* 83. But if any necessary parties be omitted (for you may take exceptions at the hearing of the cause) you may demur for want of parties, 2 Atk. 510. or unnecessary parties are inserted, the court upon application will permit the proper alterations to be made. If however a person has been made a plaintiff who is an unnecessary party, or ought to have been a defendant, the court will not permit his name to be struck out as a plaintiff, especially after answer, unless upon a special application, and then, if the defendants require it, not without security for costs, but a defendant may by amendment as after mentioned. *Pleadings by English Bill* 16.

The court will not take cognizance of a sum originally below the dignity of it, though by the neglect or displeading of the plaintiff it amounts to a larger. *Mos.* 47. *Auer.*

If

If a bill be brought for less than 10*l*. the defendant may either demur or move to dismiss it. *Mof.* 356.

Of the Framing and constituent Parts of Bills.

THE bill must be true in substance; the matter plainly yet succinctly alledged, with all necessary circumstances, as time, place, manner and other incidents. It must be of a matter cognizable in this court.

And as it must be sufficient in substance, so it must have convenient form; but this in equity is not strict or difficult.

Every bill must be under council's hand. If it be not, or the hand be counterfeited or disavowed; the bill will be dismissed on demurrer.

In case of a bill without council's hand, anciently it hath upon motion been ordered, that the defendant should not answer till council had signed the bill. *Ca. Rep.* 160.

A counsellor is not to put his hand to any bill, answer or other pleading, unless it be drawn or at least penned by himself in the paper draught before it be engrossed. And council are to take care that the same be not stuffed with the repetition of deeds, writings, or records, *in hæc verba*; but the effect and substance of so much of them only as is pertinent and material to be set down, and that in brief terms, without long and needless narratives of points not traversable, tautologies, multiplication of words, or other impertinencies, occasioning needless prolixity; to the end the ancient brevity and succinctness in bills and other pleadings may be restored and observed: much less may every council insert therein matter merely criminal or scandalous, under penalty of good costs to be laid on such council, to be paid to the party aggrieved before such council be heard in court. *Ord. Canc.* 93.

If any scandal be alledged to be in the bill (either concerning defendant or any other) it is upon motion to be referred to a master, who if he finds it so is upon a second order to expunge the scandal, and tax costs for the party scandalized. But if the Master reports it not scandalous;

then

then he who procured the reference shall pay the plaintiff costs for such reference. *Ord. Canc. 94.*

Scandal may be taken advantage of at any time, impertinence not; if reported scandalous, it must be impertinent of course; but it may be impertinent without being scandalous. Charges in a bill referred for scandal and impertinence may be relevant to the merits, and the *maius* or *minus* of the relevancy is not material, for if relevant it cannot be said they are scandalous or impertinent, otherwise it would be laying down a rule that all charges of fraud are scandalous; which would be dangerous, for nothing pertinent to the cause can be scandalous. *2 Ves. 24. Fenbulet v. Passavent.*

The plaintiff having inserted scandal in his bill, the Master taxed costs at 100*l.* the court reduced them to 50*l.* and 5*l.* more to be paid by the council whose hand was set to the bill.

1 Chan. Rep. 194. Emerson v. Dallison.

If a bill be brought for an account of fees, &c. and to establish a right, it is not enough to say the right vested in plaintiff, he must shew *how*. *Lord Digby v. Meech. Bunb. 195.*

There are nine several parts in a bill in Chancery.—

1. The direction of the bill.
2. The introduction.
3. The premises by way of recital.
4. The allegation or suggestions.
5. The complaint of fraud.
6. The clause that gives cognizance in equity.
7. The interrogating part.
8. The prayer of the bill.
9. The conclusion.

1. The direction of the bill, containing the title of the judge and stile of the court, which is always to the Lord Chancellor, Lord Keeper, or Lords Commissioners for the custody of the great seal of *Great Britain*, except where the Lord Chancellor or Lord Keeper is himself a party, or when the seals are in the King's own hands, in such case the direction is, "To the King's most Excellent Majesty in his high court of Chancery." The words of course are, when directed to the Lord Chancellor, "To the Right Honourable *Edward Lord Thurlow, Baron Thurlow of Ashfeld* in
" the

"the county of *Suffolk*, Lord High Chancellor of *Great Britain*." When there is a Lord Keeper, "To the Right Honourable Sir *Robert Henley*, Knt. Lord Keeper of the great seal of *Great Britain*." When the seal is in commission, "To the Right Honourable *Alexander Lord Loughborough* Baron of *Loughborough* in the county of *Leicester*, Sir *William Henry Ashurst*, Knt. and Sir *Beaumont Holtam*, Knt. Lords Commissioners for the custody of the great seal of *Great Britain*."

2. The introduction contains the complainant's name and place of abode, with his title or addition, as "humbly complaining sheweth unto your Lordship your orator—of—in the county of—Gent, that, &c.

3. The premises by way of recital, and the complainant must here set forth some former transactions and occurrences antecedent to the bill, stating his rights by way of case, for it is upon the case made by the complainant in his bill that the court can decree relief; the name and residence of the defendant, if known, with his title and addition, should be here stated, as That—of—in the county of—&c.

4. The allegation or suggestions of the bill, that the complainant had done such or such things at the defendant's request or for his benefit, or that the defendant had done such or such things which he ought not, to the complainant's prejudice, and this part of the bill being the ground or foundation of the clause of complaint that follows, often consists of many and divers particulars.

5. The complaint of fraud, confederacy, &c. being a general charge of combination and confederacy, this practice is said to have arisen from an idea that without such a charge parties could not be added to the bill by amendment. From whatever cause it has arisen, it is still adhered to, except in the case of a Peer, who is never charged with combining with others to deprive a plaintiff of his right; either out of respect to the peerage, or perhaps apprehension that such a charge might be construed a breach of privilege.
Pleadings by English bill.

If the general charge of combination be right, the plaintiff is well warranted in setting out the particular instances of it, general suggestions of combination and confederacy are but matter of form which the defendant is not obliged to answer, but where a particular combination is alledged a particular answer must be given to it. *Barnard.* 263. The words of course begin "But now so it is may it please your Lordship."

6. The clause which gives cognizance in equity, alledging that the complainant cannot have relief at the common law, beginning thus: "In tender consideration whereof, and forasmuch as, &c."

7. The interrogating part, which usually recites by way of interrogatory the substance of the case, allegations and suggestions. The words of course preceding are, "To the end therefore that the said — and the rest of the confederates when discovered, &c."

8. The prayer of the bill. The complainant having made out a case intitling him to the assistance of the court, usually prays that the defendant may answer upon oath the matters charged against him. It is also usual to pray the specific relief to which the complainant is intitled by his case, and also a general prayer of that relief which the circumstances of the case may require, that if the complainant mistake the relief to which he is intitled, the court may yet afford that relief to which he has a right. Indeed a prayer of general relief, without a specific prayer of the particular relief to which the complainant thinks himself intitled, is sufficient, and the particular relief the case requires may at the hearing be prayed at the bar; but this relief must be agreeable to the case made by the bill, and not different from it. *Pleadings by English bill.*

9. The conclusion generally consists of those words of course with pray process of *letter missive, subpoena, injunction*, &c. beginning and pursuing the following form: "May it please your Lordship, the premises considered, to grant unto your orator, not only his Majesty's most gracious

writ of injunction issuing out of and under the seal of this honourable court, to be directed to the said ——— to restrain him from proceeding at law against your orator touching any of the matters in question, but also his Majesty's most gracious writ or writs of *subpœna* to be directed to the said ——— and to the rest of the confederates when discovered, thereby commanding them and every of them, at a certain day and under a pain therein to be limited, personally to be and appear before your Lordship in this honourable court, and then and there full, true, direct and perfect answer make to all and singular the premises, and further to stand to, perform, and abide such further order, direction, and decree therein as to your Lordship shall seem meet. And your orator shall ever pray, &c.

The praying an injunction by proper words may be seen by the prayer of the bill, and which are to be varied accordingly; but if no injunction be prayed then the words in italics must be omitted.

If the defendant be a peer, a letter missive must be prayed, in these words, preceding the process of *subpœna*, to grant unto your orator your Lordship's letter missive to be directed to the said Earl of ——— desiring him to appear to and answer your orator's said bill, or in default thereof his Majesty's most gracious writ or writs of *subpœna*, &c.

Conclusion to a Bill praying a Writ of *Ne exeat Regno*.

May it please your Lordship, the premises considered, to grant unto your orator, not only his Majesty's most gracious writ of *ne exeat regno*, issuing out of and under the seal of this honourable court, to restrain the said defendant ——— from departing out of the jurisdiction of this court, but also his Majesty's most gracious writ or writs of *subpœna*, &c. ———

If the original bill pray a writ of injunction, it is termed an injunction bill.

After the bill is drawn or perused and signed by council, it must be fairly ingrossed on parchment with double one shilling stamps, and carried to a clerk in court to be filed, who

who first enters it in his cause-book, and then in the general bill-book of the office, after which he marks it at the top with the day of the month and year, and subscribes his name at the bottom on the left side, and delivers it to his fix-clerk to be filed; if the fix-clerk be absent, he puts it over his study door, and the fix-clerk having entered it in his book, files it.

The bill ought regularly to be filed before the process of *subpœna* issues. An injunction bill excepted.

All bills are to be dated the same day they are brought into the fix-clerks office, and no fix-clerk to presume to antedate any bill, and no under clerk to presume to keep any bill by him, but with the first opportunity deliver the same to the fix-clerk, or his allowed deputy in his absence, to be accordingly filed.—No bill, answer, or other pleading shall be said to be of record, or to be of any effect in court, until the same be filed with such of the fix clerks with whom it ought properly to remain. *Ord. Canc. 94.*

Of the several Kinds and Distinctions of Bills.

BILLS with their several kinds and distinctions may be considered under these general heads:—

I. Original bills, which relate to some matter not before litigated in the court by the same persons standing in the same interests.

II. Bills not original, which are either an addition to or a continuance of an original bill, or both.

III. Bills which though occasioned by or seeking the benefit of a former bill are not a continuance thereof, and are therefore in the nature of original bills.

I. Original bills may be again divided into bills praying relief, and bills not praying relief—An original bill praying relief may be

1. A bill praying the decree of the court touching some right claimed by the person exhibiting the bill, in opposition to some right claimed by the person against whom the bill is exhibited.

Of the several Kinds of Bills.

2. A bill of interpleader, where the person exhibiting the bill claims no right in opposition to the rights claimed by the persons against whom the bill is exhibited; but prays the decree of the court touching the rights of those persons, for the safety of the person exhibiting the bill.

3. A bill praying the writ of *certiorari* to remove a cause from an inferior court of equity.

An original bill not praying relief.

1. A bill to perpetuate the testimony of witnesses.

2. A bill for discovery of facts resting within the knowledge of the person against whom the bill is exhibited, or of deeds, writings, or other things in his custody or power.

II. A bill not original, but an addition or a continuance of an original bill, or both, may be.

1. A supplemental bill, which is merely an addition to the original bill.

2. A bill of revivor, which is a continuance of the original bill, when by death some party to it has become incapable of prosecuting or defending a suit, or a female plaintiff has by marriage incapacitated herself from suing alone.

3. A bill both of revivor and supplement, which both continues a suit upon an abatement, and supplies defects arising from some event subsequent to the institution of the suit.

III. A bill in the nature of an original bill, though occasioned by or seeking the benefit of a former bill, may be,—

1. A cross bill exhibited by the defendant in a former bill against the plaintiff in the same bill touching some matter in litigation in the first bill.

2. A bill of review to examine and reverse a decree made upon a former bill, and signed by the person holding the seals, and inrolled, whereby it has become a record of the court.

3. A bill in the nature of a bill of review, brought by a person not bound by the former decree.

4. A bill to impeach a decree upon the ground of fraud.
5. A bill to carry a decree made in a former suit into execution.

A bill in the nature of a bill of revivor, to obtain the benefit of a suit after abatement in certain cases which do not admit of a continuance of the original bill.

7. A bill in the nature of a supplemental bill, to obtain the benefit of a suit either after abatement in other cases which do not admit of a continuance of the original bill; or after the suit is become defective without abatement in cases which do not admit of a supplemental bill to supply that defect.

8. A bill filed by the direction of the court for the purpose of obtaining its decree touching some matter not put in issue by a former bill, or not in issue between the proper parties, but which must necessarily be determined to enable the court to make a compleat decree touching the matters in litigation upon the first bill. *Pleadings by English bill* 11.

Amended Bill.

WHEN a complainant has preferred his bill in this court, and is advised the same doth not contain such material facts, or make all persons parties necessary to enable the court to do compleat justice, he may alter his bill by inserting new matter, subsisting at the time of exhibiting his bill, and of which he was not then apprized, or presumed not necessary to be stated, and may add such persons as shall be deemed necessary parties; or in case the original bill should be found to contain matter not relevant, and no longer thought necessary to form part of the plaintiff's case, the same may be struck out, and the original bill, thus added to or altered, is termed an amended bill. Every amendment, be it never so often made, is in fact a continuation of the original bill, and is considered as forming part thereof, for both the original and amended bills constitute

but one record, and the amended bill is in all cases addressed to the same Lord Chancellor, Lord Keeper, or Lords Commissioners, to whom the original bill was addressed, and at the hearing of the cause both bills are considered as forming but one record. But in case the defendant hath answered the original bill, he ought to answer the amendments only.

When the new matter is but small, and does not exceed in any one place two sheets, the record is amended by interlining, provided the same be done so as to make the record fair and legible, or if the amendment be by omitting original matter, it is done by striking though the same with the pen. If the amendment be too copious for interlineation in the original record, then the bill is new ingrossed and annexed to the original bill. If the amendment be made before appearance, it is done without costs, so after appearance and before answer, or after answer and no further answer be required. It is also done without costs, amending defendant's copy, but if a further answer be required, or if the bill be newly ingrossed, then plaintiff prays 20s. costs, to the clerk in court, for each defendant or set of defendants, or in case the clerk in court be employed by two or more solicitors, then to such clerk in court 20s. for each defendant or set of defendants employing a different solicitor, and if a further answer be required then a *subpœna* to appear and answer must be served, and in default, the ordinary process of contempt may be issued. The plaintiff may also amend his bill after replication, upon obtaining an order to withdraw his replication and amend his bill, which is always done upon payment of the like costs. And in every case where it is done upon payment of costs, they must be first paid, or the proceedings are nugatory.

In all these cases the orders to amend are obtained by motion or petition of course to the Master of the Rolls. And a copy of the order must be served upon the adverse clerk in court before plaintiff can proceed, and the order itself must be left with the plaintiff's clerk in court.

If

If defendant answers insufficiently, and exceptions are taken to such answer, and it be referred to a Master who, upon arguing the exceptions before him, reports the answer insufficient; in this case the bill may be amended, by order obtained upon motion or petition without costs, suggesting that the answer is reported insufficient, and praying that defendant may answer the amendments and exceptions at the same time; and when exceptions are taken to any answer, and defendant submits to put in a better answer, and it is necessary to amend the bill, it may be done without costs.

When plaintiff hath obtained an order to amend after answer, and neglects so to do, defendant may after three terms move to discharge the order, and at the same time move to dismiss the bill, in the usual manner; or if an injunction hath been obtained for default of appearance or of answer, and plaintiff amend his bill, upon coming in of defendant's answer, defendant must after answer to the amendments move to dissolve the injunction *nisi*, for the injunction is not dissolved by plaintiff's amending his bill, or by defendant's answer thereto; and if after answer, and before the injunction be dissolved, defendant incur a breach thereof, he may be committed. This was determined in the case of *Mason v. Murray*, per Lord Bathurst.

When plaintiff hath obtained an order to amend his bill, and neglects to act under it, defendant may move that plaintiff may amend his bill in a limited time, or the order to amend be dissolved. The plaintiff sometimes excepts to defendant's answer and then moves to amend, and that defendant may answer the exceptions and amendments at the same time, and frequently to keep an injunction in force, or otherwise plaintiff does not amend within a reasonable time, in this case defendant may move that plaintiff be ordered to amend in a certain time, or that the order to amend be discharged, and defendant be at liberty to answer the original bill.

Before answer a defendant may be struck out of the bill, upon plaintiff's request, or if defendant has answered and

disclaimed, or appears disinterested, such defendant may be struck out at any time before hearing; but, after appearance and answer, it must be with costs, the bill as to him being dismissed.

By the course of the court the plaintiff in a cross cause cannot have an answer till he has himself answered the original bill: but this is a privilege the plaintiff in the original bill has in right of his original bill; for if after the cross bill be filed he will amend the original bill in material parts, he will not be intitled to have an answer to the amendments; for as the bill may be amended both in discovery and relief, the pendency of suit, as to those parts which are amended, is only from the time of the amendment; for by amending the original bill after a cross bill filed, the plaintiff in the original bill has lost his priority of suit. 2 Atk. 219. *Long v. Burton.*

After a third order of amendment a defendant will be allowed costs to be taxed. 2 Atk. 123.

Lord *Hardwicke* was inclined to think, that where there is an amended bill and no answer to it, the plaintiff is intitled to a decree *pro confesso*, abstracted from any proceedings in the original cause. 2 Atk. 25. *Davis v. Davis. Die.*

An original bill by a creditor against *B.* as administratrix of *A.* who being married her husband was made party; before hearing the wife dies, the husband took out administration *de bonis non, &c.* of *A.* upon which plaintiff amended his bill against the husband, to which amendment defendant demurred. *For any matter which arises subsequent to the original bill cannot be put into an amended bill*, but a bill of revivor and supplement ought to be brought. Demurrer allowed. It is a constant rule, that matter subsequent to the bill must come in by way of supplement and revivor; besides the suit abates intirely by the death of the wife, for the husband who was joined for conformity only now has an interest. 1 Atk. 291. *Brown v. Higdon.*

The bill charged, by way of amendment, matters which arose after filing the bill, *viz.* that plaintiff had taken out
that

letters of administration ; and although it was pleaded that this was matter proper in a supplemental bill, yet the plea was over-ruled, for that such matters may be charged either by way of supplement or amended bill. *Humphreys v. Humphreys.* 3 *Wms.* 351.

After publication, and any time before hearing, the court will, upon cause shewn, suffer the bill to be amended by adding parties. And if parties be added after publication, the cause, as to such parties, must be heard upon bill and answer only. After publication is past, there is no instance of a plaintiff obtaining an order to amend his bill without withdrawing his replication. 1 *Atk.* 51. *Anon.*

A plaintiff may amend his bill, upon payment of twenty shillings costs, after a demurrer is put in, if it be not set down to be argued, and after it is set down on payment of the costs of the demurrer. *Mos.* 301. *Anon.*

After publication has passed and the cause set down, the bill may be amended in no other respect than by making parties, and no new charge can be introduced or a material fact put in issue which was not so in the cause before, but a supplemental bill should be preferred. *Goodwin v. Goodwin and others.* 3 *Atk.* 370.

After defendant hath answered, if plaintiff amend his bill, and require no answer from the defendant amending defendant's office copy, the defendant has eight days exclusive after the record is amended and delivered over to answer the amendments, and plaintiff cannot reply to defendant's answer until the eight days be elapsed.

A plaintiff by a false suggestion that the cause was at issue only when it was in the Lord Chancellor's paper for hearing, obtained an order by petition at the Rolls for liberty to amend his bill, by inserting the prayer of the original bill which had been omitted by negligence in the amended bill : the order at the opening of the case was discharged as being irregularly obtained, with twenty shillings costs, and the cause put off till next term, that upon paying the costs of the day

day the plaintiff might have an opportunity of amending his bill. 3 Atk. 583. *Harding v. Cox.*

No precedent in this court of an amendment to a bill in part wherein it has been dismissed upon its merits. 2 Wms. 402.

After a demurrer to the whole bill allowed, the bill is regularly out of court, and no instance of leave to amend it, though before the arguing the demurrer the plaintiff might have amended, 2 Wms. 300. *in notis.*

Bill of Interpleader.

WHERE two or more persons claim the same thing by different or separate interests, and another person, not knowing to which of the claimants he ought of right to render a debt or duty, fears he may be hurt by some of them, he may exhibit a bill of interpleader against them, that the court may adjudge to whom the thing belongs, and he be made safe in the payment, and this he may do whether any suits be actually commenced against him in law or equity, or is only in danger of being molested. As where different persons claim the same thing in distinct and separate interests.

A bill of interpleader is sometimes necessary, where one who is not party in the first suit, supposing he has a separate interest in the matter in question, commences his suit against the first defendant, praying to be relieved according to his right; whereupon the first plaintiff makes the second a defendant in order to interplead and contest the right: or if the first plaintiff does not make him a defendant, then if the defendant exhibits his bill, as he may do, against both plaintiffs, and pray they may interplead and try to which the thing in demand belongs, and further as his case requires: or if there be no suits here between the claimants, he who has suits at law brought against him, or is in danger of litigation from both the claimants, may file his bill against them, and pray that they

they may interplead, and that proceedings at law may be staid till the right be determined. *Prac. Reg.* 39.

The plaintiff in a bill of interpleader must annex to his bill an affidavit that he does not exhibit his bill by fraud or collusion with all or either of the parties, or with any person or persons whomsoever, but only to be indemnified and to pay his rent or debt to such person as the court by its decree shall direct; and plaintiff should by his bill offer to bring the money into court, otherwise the court will not interfere by injunction to stay proceedings at law.

A bill for this purpose may state the claims of the defendants, and the situation and rights of the party exhibiting the bill, offering to pay what money, if any, is due into court, and praying that the parties may interplead, and that the court may order and decree to which of them the thing in demand belongs, and that the parties may be restrained from proceeding at law against the plaintiff until the right be determined.

In a bill of interpleader it is not necessary that the plaintiff should bring the money into court, unless the other side require it.—But it is necessary in such bill that the plaintiff should make an offer to bring it in, and even the whole of the money as it is demanded by the original bill. *Barnard.* 251. *Earl of Thanet and others v. Patterson and others.*

A mortgagor brings his bill to redeem, after come assignees of the mortgagee with a bill of interpleader, the mortgagor then makes them defendants to his bill, they say they are ready to receive the money. By the interpleader and delay of proceedings thereupon, the mortgagor keeps the money by him two years. He prays he may now pay it into court to save further interest; which the court would not order, but gave leave to the mortgagor to set down the cause for hearing against all on bill and answer. *Prac. Reg.* 39.

If a cause has been heard upon a bill of interpleader, and a trial at law directed to settle the right between the defendants,

ants, there is an end of the suit as to the plaintiff; so that if he afterwards die the cause shall still proceed, and there need no revivor, each defendant being in the nature of a plaintiff. Ruled upon motion. 1 Vern. 351.

The affidavit to a bill of interpleader need not swear that it is at plaintiff's own expence, only that there is no collusion with any of the defendants. *Metcalf v. Harvey.* 1 Ves. 248.

A bill of interpleader must shew there is such a person *rerum natura* as can interplead. *Ibid.*

If a guardian sets up a title to himself, and conceals an infant who is suggested to have right to controvert that title, a bill may be brought to compel the guardian to produce him. *Ibid.*

A bill of interpleader cannot pray an injunction to restrain proceedings in ejectment, because such bill cannot be as to the possession, but must be as to the payment of some demand of money. *Ibid.*

An executor as he is in *auter droit*, unless he has proved his testator's will, is not intitled to bring a bill of interpleader, till, as standing in the place of the testator by virtue of the probate, he has made himself a debtor. At law an executor may bring an action before probate, but he cannot declare till the will is actually proved; and a bill in equity being in the nature of a declaration at law an executor cannot bring a bill here till after probate. *Mitchell v. Smart.* 3 Atk. 606.

To a bill of interpleader against the Attorney-general and others, there must be an affidavit annexed. *Evington v. Attorney-general and others.* Bunb. 303.

Certiorari Bill.

THIS species of bill derives its name from the writ of *certiorari* which is especially prayed by and is the object of the bill.

The

The scope of the bill being merely to remove the cause and proceedings into the court of Chancery, from an inferior court of equity, upon suggestions that by means of the limited jurisdiction of the court, or that the cause is without the jurisdiction of the inferior court, or that the witnesses live out of the jurisdiction, or that the defendants do, and are not able by age and infirmity, or the distance of place, to follow the suit, or some other good reasons, that by all or any of these incidents the defendant cannot have complete justice.

For this purpose the bill should state the proceedings in the court below, the incompetency of that court, and pray a writ of *certiorari*. No appearance or answer is required, and consequently the writ of *subpoena* is not prayed.

When the party has filed the *certiorari* bill in Chancery, he must enter into a bond with the register to prove the suggestions of the bill in fourteen days. A *subpoena* must next be sued out and served; and the register's certificate of security being given, and a certificate from the fix clerk, that the bill is filed, being obtained; a brief of the bill should be prepared, and the writ moved for in court, which being granted, and the order drawn up, passed and entered as in common cases, the Solicitor must apply to the fix clerk to make out the writ, which is directed to the judge of the inferior court, requiring him to certify or send to this court the tenor of the bill or plaint, with the process and proceedings thereon. The writ being served and returned, together with the process and proceedings, upon motion, the writ of *certiorari*, together with the proceedings removed, will be ordered to be filed. The interrogatories to prove the suggestion of the bill being drawn, and filed with the examiner, and witnesses being examined accordingly, an order should be obtained upon motion or petition to refer the examination to a master, and the examiner to attend with the depositions; and if it appears by the plaintiff's own shewing in his bill below that he

lives

lives out of the jurisdiction of the inferior court, without proving any allegation, an order may be obtained on motion or petition to retain the bill removed; after which the defendant must put in an answer as if the cause had been originally instituted in the court of Chancery; but if it be necessary to proceed upon the interrogatories, the Master's report must be obtained, and if he certifies the suggestion of the bill to be proved, the court must be moved to retain the bill upon such report: and in case the suggestion cannot be proved in the fourteen days, an order for further time may be obtained upon motion or petition, an affidavit of the fact sufficient to induce the court to grant that indulgence being first filed. If the suggestions are not proved, a *procedendo* may be applied for of course.

The *certiorari* bond is to be entered into by the plaintiff and one security, in the penalty of 100*l.* to the Master of the Rolls and the senior Master in Chancery.

Though the plaintiff is to examine and have publication within fourteen days after the return of the *certiorari*, to prove his suggestions and give the court jurisdiction, the defendant is not at liberty to examine, or publish anything to disprove it: and though the defendant should examine as soon as answer, yet the depositions shall not be published but in ordinary course; for after the plaintiff's first examination to affirm the jurisdiction if the court retain the cause, both parties are to examine orderly to the merits and body of the cause, and have publication according to the ordinary rules. *Toth.* 145.

Plaintiff, an apprentice, had sued in the Mayor's court to have 150*l.* repaid, which his mother had paid to defendant to take him apprentice; defendant brought a *certiorari* bill, and entered into the usual bond to prove the suggestions, and upon a reference the Master certified plaintiff had proved his suggestions, and thereupon a *procedendo*, though several times moved for, was denied; so that defendant was necessitated to reply, and both sides examined witnesses,

and publication passed, plaintiff served defendant with a *subpœna* to hear judgment, and upon opening the nature of the case, the Lord Chancellor and Master of the Rolls were both of opinion that it should be sent back to be determined in the Mayor's court. And the *Register* said it had often been done both ways, some retained and decreed here, but oftener sent back, sometimes after publication and sometimes after a *subpœna* served to hear judgment. *Stephenson v. Houlditch.* 2 *Vern.* 491.

The plaintiff brought a *certiorari* bill; the defendant pleaded a decree in the Mayor's court, and an inrollment, which was said to be only pronuncial. And it was referred to a Master to certify whether it was before the bill. *Cook v. Delebere.* 3 *Chan. Rep.* 37.

After a decree to account in the *Exchequer of Chester*, the defendant shall not have a *certiorari* bill, upon a pretence that his witnesses and deeds are out of that jurisdiction. *2 Imp. Finch. Rep.* 452.

The plaintiff brought a *certiorari* bill to remove a cause out of the Mayor's court, his witnesses living out of that jurisdiction, and inserted other matters relating to an account not in controversy in the Mayor's court. After examination of witnesses the defendant moved for a *procedendo*, and insisted that if the cause should be heard here he could not be relieved, not having any bill here; but a *procedendo* was denied, the bill containing *other matters* not determinable in the Mayor's court, neither can the bill be divided; but the cause after hearing was dismissed out of this court. *Rich v. Jacques.* 1 *Chan. Ca.* 31.

A *certiorari* bill may be brought to remove a cause out of a court of Equity in a county palatine to this court. *1 Arn.* 178. *Portington v. Tacbork.*

Plaintiffs here sue for lands in the county palatine of *Durham*; one of them lives in the county of *Middlesex*, the other is an infirm old man, and not able to follow the suit; therefore a *certiorari* was granted to the Chancellor of *Durham*;

Durham to certify the proceedings depending before him into this court. *Hilton v. Lawson. Ca. Rep.* 68.

The writ of *certiorari* lies not upon *English* bill to remove *Latin* proceedings into this court, which cannot in that way hold plea thereupon. 2 *Chan. Rep.* 109. This seems otherwise since the stat. 4 *Geo. 2. c.* 26.

Of Original Bills not praying Relief.

Bill to perpetuate the Testimony of Witnesses.

A Bill to perpetuate the testimony of witnesses must shew a title in the plaintiff to the thing whereto the testimony relates, stating that the witnesses are old, infirm, or sick, or not likely to live long, or that they are going to sea or beyond seas, whereby the party is in danger of losing the benefit of their testimony; for this purpose the bill must pray leave to examine witnesses thereto, to the end their testimony may be preserved and perpetuated, and process of *subpœna* to the parties interested to shew cause if they can to the contrary.

After the bill is filed, the court, on affidavit made that the said witnesses are old, infirm, going beyond sea, &c. so that the party is in danger of losing their testimony, if they live in the country, will upon motion or petition and affidavit grant a commission, or if they reside within twenty miles of *London* will order them to be examined by the examiner *de bene esse*, which will make their depositions valid in that case only and against those who are parties to the bill; but if it appear, that they might afterwards have been examined in chief regularly, such depositions shall not be made use of, and if the witnesses live till they can be examined in chief, they must be examined in chief, but if they die in the mean time, or have not returned from beyond sea before the hearing, then their depositions may be published. The depositions thus taken will bind as well the parties as all claiming by, through, or under them.

The

Of Original Bills not praying Relief. 33

The complainant may proceed to examine his witnesses *in perpetuam rei memoriam*, either by the examiner or by commission before *subpœna* is served; after *subpœna* served the defendant may come in by appearance and join in commission if he pleases, and then fourteen days notice must be given of executing the commission, except in the short vacation, when ten days notice is sufficient. See title *Examination in perpetuam rei memoriam*.

If the defendant shew good exceptions against a witness or other cause for the staying the proceedings, the commissioners ought not to proceed but to certify such matters with the commission.

Bills to examine *in perpetuam rei memoriam* were utterly disliked by Lord Egerton, because the depositions are not ordinarily to be published; but upon oath that the witnesses are dead, and being dead there is no remedy against them if they have committed perjury. And he ordered the party filing a bill for a right of common, to exhibit his bill on the title and so to proceed to an examination and publication in ordinary course, saying they might go to law if they would, and take the benefit of these examinations. *Toth.* 18.

Where lands are devised by will, and there is no occasion or opportunity to prove and establish it at law, it is often thought necessary to perpetuate the testimony thereto in this court. *Stiles P. Reg.* 587. The way to do which is to exhibit the bill against the heir at law, and therein set forth the will *in hæc verba*. The defendant having appeared and answered, they must proceed to issue as in other cases, and then examine all the witnesses, if living, to the proof of the original will, or prove the hand-writing of such of them who are dead, which being done and publication past, the cause is at an end. And though this court suffers examinations to perpetuate testimony of a will, yet it will not barely try the validity of a will. But if the same come collaterally in question upon a bill for the performance of a trust, or touching a devise out of lands, &c. the court will sometimes direct an issue at law to try the validity.

34 Of Original Bills not praying Relief.

Upon a *subpoena in perpetuam rei memoriam*, the defendant appearing consented to join in commission so as the Lord Bacon orders, touching examination of witnesses, in perpetual testimony might be observed; but upon motion it was ordered that the commission should be made general, in like cases where the parties join, for that it seemed to the court the Lord Bacon's orders were intended to be observed only where the plaintiff hath a commission alone. *Lord Dacres v. Southwell. Ca. Rep. 122.*

In a bill to perpetuate testimony, if the plaintiff pray relief the bill shall be dismissed. *2 Ventr. 366.*

A bill was exhibited to examine witnesses *in perpetuam rei memoriam*, to prove a *modus decimandi*. The defendant demurred for that the bill was to establish a custom against the church, and in prejudice of tithes which are due *communi jure*, and several precedents were cited where bills to have a *modus* decreed were upon demurrer dismissed; but this bill being only to preserve testimony, the Lord Keeper thought it reasonable the defendant should answer, and over-ruled the demurrer. *1 Vern. 185.*

A bill brought by defendant at law to examine witnesses to prove his right of common *in perpetuam rei memoriam*. *Per cur.* such a bill is not to be admitted in this court, commoner ought not to come here to prove his right of common, until he has recovered at law in affirmation of his right. *1 Vern. 308. Pawlet v. Ingres.*

A bill to examine witnesses to preserve their testimony touching the title of certain lands in the bill mentioned. The defendant demurred, because there was no impediment that hindered the plaintiff from trying his right at law: and that he had not obtained any verdict in affirmation of his pretended title. Demurrer allowed. *1 Vern. 441. Parry v. Rogers.*

Bill to prove a will and perpetuate testimony of witnesses. Defendant pleaded himself a purchaser for a valuable consideration without notice, and insisted that unless there had been a verdict in affirmation of such will the plaintiff ought

to be admitted to examine his witnesses. Plea allowed. *Vern.* 354. *Bechinal v. Arnold.*

A bill will not lie to perpetuate the testimony of witnesses to a lunatic's will in his lifetime made before his lunacy. *Vern.* 105. *Sackvil v. Ayleworth.*

Upon a bill to perpetuate the testimony of witnesses touching a right to a way, the plaintiff must set out the way exactly in his bill, *per et trans*, as he ought to do in a declaration at law.—But such a bill ought not to be brought for such trivial things as right of common, or for ways or water-courses, or at least not till after a recovery at law. *1 Vern.* 312. *Gell v. Hayward.*

J. S. brought his bill for a commission to examine his witnesses *in perpetuum rei memoriam*, to establish his sole right of fishery, suggesting that the defendant pretended a sole right of fishery, and threatened to bring actions, and disturb plaintiff when his witnesses should be dead. Defendant demurred, for that J. S. had not verified his title at law, and therefore had no right to bring his bill in the first instance. Demurrer overruled—and this difference was taken and agreed to by the court, that if one out of possession brings such bill, a demurrer will be good, because he ought first to establish his right at law; but when plaintiff suggests defendant threatened to disturb him, &c. when his witnesses should be dead; if the defendant not only threatened but actually did disturb him by fishing, &c. daily; in such case the defendant should plead that he did daily disturb plaintiff, and therefore the plaintiff shall seek remedy at law—or if plaintiff had shewn in his bill that defendant had actually disturbed him, then the demurrer had been proper, but not for bare threatening. *Duke of Dorset v. Serjeant Girdler. Preced. in Chan.* 531.

A man may bring a bill to perpetuate testimony, where he cannot bring a bill for relief without waiving the penalty, as in waste, &c. *1 Atk.* 450. *Earl of Suffolk v. Green.* Plaintiff is intitled to perpetuate testimony on an usurious contract, though he does not offer to pay what is really due. *Ibid.*

34 Of Original Bills not praying Relief.

Upon a *subpœna in perpetuam rei memoriam*, the defendant appearing consented to join in commission so as the Lord Bacon orders, touching examination of witnesses, in perpetual testimony might be observed; but upon motion it was ordered that the commission should be made general, as in like cases where the parties join, for that it seemed to the court the Lord Bacon's orders were intended to be observed only where the plaintiff hath a commission alone. *Lord Dacres v. Southwell. Ca. Rep. 122.*

In a bill to perpetuate testimony, if the plaintiff pray relief the bill shall be dismissed. *2 Ventr. 366.*

A bill was exhibited to examine witnesses *in perpetuam rei memoriam*, to prove a *modus decimandi*. The defendant demurred for that the bill was to establish a custom against the church, and in prejudice of tithes which are due *communi jure*, and several precedents were cited where bills to have a *modus* decreed were upon demurrer dismissed; but this bill being only to preserve testimony, the Lord Keeper thought it reasonable the defendant should answer, and over-ruled the demurrer. *1 Vern. 185.*

A bill brought by defendant at law to examine witnesses to prove his right of common *in perpetuam rei memoriam*. *Per cur.* such a bill is not to be admitted in this court, a commoner ought not to come here to prove his right of common, until he has recovered at law in affirmance of his right. *1 Vern. 308. Pawlet v. Ingres.*

A bill to examine witnesses to preserve their testimony touching the title of certain lands in the bill mentioned. The defendant demurred, because there was no impediment that hindered the plaintiff from trying his right at law: and that he had not obtained any verdict in affirmation of his pretended title. Demurrer allowed. *1 Vern. 441. Parry v. Rogers.*

Bill to prove a will and perpetuate testimony of witnesses. Defendant pleaded himself a purchaser for a valuable consideration without notice, and insisted that unless there had been a verdict in affirmance of such will the plaintiff ought

not to be admitted to examine his witnesses. Plea allowed.
1 Vern. 354. *Bechinal v. Arnold*.

A bill will not lie to perpetuate the testimony of witnesses to a lunatic's will in his lifetime made before his lunacy
1 Vern. 105. *Sackvil v. Ayleworth*.

Upon a bill to perpetuate the testimony of witnesses touching a right to a way, the plaintiff must set out the way exactly in his bill, *per et trans*, as he ought to do in a declaration at law.—But such a bill ought not to be brought for such trivial things as right of common, or for ways or water-courses, or at least not till after a recovery at law. 1 Vern. 312. *Gell v. Hayward*.

J. S. brought his bill for a commission to examine his witnesses *in perpetuum rei memoriam*, to establish his sole right of fishery, suggesting that the defendant pretended a sole right of fishery, and threatened to bring actions, and disturb plaintiff when all his witnesses should be dead. Defendant demurred, for that J. S. had not verified his title at law, and therefore had no right to bring his bill in the first instance. Demurrer overruled—and this difference was taken and agreed to by the court, that if one out of possession brings such bill, a demurrer will be good, because he ought first to establish his right at law; but when plaintiff suggests defendant threatened to disturb him, &c. when his witnesses should be dead; if the defendant not only threatened but actually did disturb him by fishing, &c. daily; in such case the defendant should plead that he did daily disturb plaintiff, and therefore the plaintiff shall seek remedy at law—or if plaintiff had shewn in his bill that defendant had actually disturbed him, then the demurrer had been proper, but not for bare threatening. *Duke of Dorset v. Serjeant Girdler. Preced. in Chan. 531.*

A man may bring a bill to perpetuate testimony, where he cannot bring a bill for relief without waiving the penalty, as in waste, &c. 1 Atk. 450. *Earl of Suffolk v. Green*. Plaintiff is intitled to perpetuate testimony on an usurious contract, though he does not offer to pay what is really due. *Ibid.*

36 Of Original Bills not praying Relief.

Tenant in tail out of possession cannot bring bill to perpetuate testimony till he has recovered possession by ejectment: and demurrer for this cause would be allowed. 1 Atk. 571. *Brandlyn v. Ord.*

Where plaintiff on a bill to perpetuate the testimony of witnesses has examined, and thereby had the fruit of the bill, neither herself nor the defendant are intitled to costs. 2 Atk. 167. *Lady Coddington v. England.*

Bill for discovery and perpetuating testimony, plaintiff struck out the discovery and all the relief, but, in praying process, prays that defendant may abide such order and decree as the court shall think proper, it makes a bill for relief, and ought to be dismissed. *Rose v. Gannel.* 3 Atk. 439.

In a bill to perpetuate testimony of witnesses, costs are never given against defendant. 1 Atk. 610. *Dic.*

On a bill to discover a title to land, and to perpetuate testimony, &c. defendant answered as to the title, and demurred as to the perpetuating the evidence, in regard the defendant might bring his ejectment, and examine his witnesses at the trial, and upon affidavit that the plaintiff's witnesses were infirm and unable to travel, the demurrer was over-ruled by the Master of the Rolls, and afterwards by the Chancellor Lord Cowper on a re-hearing, but without such an affidavit the demurrer had been good. *Philips v. Carew.* 1 Wms. 117.

Bills of Discovery.

A Bill emphatically termed a bill of discovery, is a bill for discovery of facts resting in the knowledge of the defendant, or of deeds or writings in his custody or power, and seeks no relief further than the mere discovery and delivery of the deeds, &c. though this latter part is not always introduced into a bill of this nature; a bill for this purpose must state the right of the party to the discovery prayed and interrogate accordingly. When a discovery merely, or a delivery of deeds, &c. is the object of the bill, an affidavit is not requisite. But if any other relief be prayed, the plaintiff must annex to his bill an affidavit that

that the deeds or writings of which a discovery is sought, are not in his custody or power, or that he knows not in whose custody or power they are, unless they are in the hands of the defendant.

Whenever a bill is for a discovery only, and the plaintiff has a full discovery by the defendant's answer, the plaintiff cannot reply or proceed, for by the discovery the plaintiff has obtained the end of his bill, and when he has had the benefit of it in an action at law, and comes after to dismiss the bill (which he must do or defendant will) such dismissal will be with costs to be taxed, which seems hard, since the defendant was the occasion of this bill by his false plea below, and the plaintiff there can be allowed no costs in equity. *Vid. stat. 4 & 5 Annæ, c. 16. s. 23. Calverly v. Parker. Bunb. 12.*

An affidavit of the loss of a deed is necessary where the bill seeks to be relieved on the matter of that deed, because the want of this deed is the only foundation the plaintiff has to draw the cause from law to equity; but where the bill seeks no decree, but a discovery merely, or to have the deed produced at the trial, or the like, an affidavit is not necessary, because it is not to be presumed that the plaintiff would put himself to the expence of a trial, if the deed was in his own hands. *Mos. 192. 1 Chan. Ca. 11.*

If the bill exhibited be grounded on the loss of a bond, as it is the loss which entitles the court to jurisdiction of the cause, affidavit must be made of it. *1 Chan. Ca. 231.*

But if a person comes only for a discovery of a deed, he need not make oath of the loss of it, as he must do when he comes for relief; for he cannot translate the jurisdiction, without oath made of the loss of the deed. *1 Vern. 247.*

Where a bill was brought for the bare discovery of a deed, and the defendant demurred because the plaintiff had not made oath, according to the course of the court, that he had not the deed, upon which this distinction was taken and allowed by the court, viz. that where a person comes for a discovery and prays relief, there it is necessary for him

to make affidavit of the want of the deed; but when he seeks but a bare discovery, as to have it produced at a trial, it is not necessary, for it is not to be presumed that the plaintiff, in either of the latter cases, would do so absurd a thing as exhibit a bill, if he had the deed. 1 *Chan. Ca.* 11. 1 *Vern.* 180. *S. P. sed vid.* 1 *Vern.* 59, where the distinction seems to be taken quite contrary, but seems to be the mistake of the reporter. *Eq. Ca. Abr.* 14.

If a bill be purely for a discovery and delivering up a deed, and prays no other relief, an affidavit that plaintiff hath not the deeds is not necessary; but if the bill be for relief generally upon any bond or deed, as to recover money upon the bond, or profits of land under the deed, an affidavit that the deed is not in plaintiff's custody, must be annexed, because the bill does by consequence seek to transfer the jurisdiction from law to equity, 2 *Wms, Whitchurch v. Golding* 541.

When a bill is exhibited for a general discovery of deeds, 'tis not necessary for the plaintiff to annex the usual affidavit that he has none of them in his custody; but where the bill is for a discovery of a particular bond, for want of which the plaintiff could not recover his debt at law or the possessor in ejectment, in these cases 'tis fit he should make oath that he himself has not the bond or deed, because if he had, his remedy is proper and open at law, and then he is not to put another to the unnecessary expence of an answer to deny his having it. *Preced. in Chanc.* 536.

If a bill be brought for relief, as well as discovery of deeds, an affidavit must be annexed that plaintiff has not the deeds in his custody, or defendant may demur. 3 *Atk.* 17. *Anon.*

If a bill be brought to be relieved against a deed fraudulently cancelled by the defendant and to have another deed executed, the plaintiff need not make oath of the loss of the deed, because he could have no remedy at law though the deed was in his hands. *Mof.* 192. *King v. King.*

Every heir at law has a right to a discovery by what means and under what deed he is disinherited. *Harrison v. Southcote.* 1 *Atk.* 528.

Bill lies for discovery of court rolls, ledgers, &c. to be used at a trial which relates to plaintiff and defendant.
Hurd. 180.

Any person in possession, as tenant or otherwise, may bring bill for discovery of his title who brings ejectment against him; even though he is a wrong doer against every body. *Medcalf v. Harvey.* 1 Ves. 248.

A bill for discovery of a note, deed, &c. lies after six years are elapsed, for the statute of limitations is no plea to it. *Ch. Rep.* 14. *Dean, &c. of Westminster v. Cross.* *Bunb.* 60.

Bill for the discovery of a promissory note for 275*l.* suggesting that it was given *ex turpi causa* to smother and make up a felony, &c. Demurrer to that part of the bill which seeks a discovery, if the note were not given to compound a felony, which is of a criminal nature, &c. Demurrer allowed. 8 *Vin. Abr.* 543. *pl.* 6. *Guiborn v. Fellows et al.*

Though no bill of discovery will lie on penal statutes without waiving the penalty, yet the advantage of pleading it seems waived by partners in clandestine trade. *Gilb. Eq. Rep.* 186, 187.

Persons who claim lands by will or any other voluntary disposition, having the law on their side, are intitled, as against an heir at law, to a discovery in equity of deeds relating to the estates, and to have them delivered up; otherwise the heir might defend himself at law by setting up prior incumbrances, and by that means hinder the trying the validity of the will. 8 Vin. Abr. 551. pl. 12. *Dutcheffs of Newcastle v. Lord Pelham.*

The lord of a manor brought a bill of discovery of treasure-trove. *Per Cur.* The bill is proper enough as to the discovery, but he can have no relief, because he may bring *trover*; and the bill was dismissed with costs. *Sloane v. Heathfield. Bunb. 18.*

A bill for discovery to enable the plaintiff to bring an action was allowed though the action founded in *tort*.
1 Vern. 307. 2 Vern. 442-3.

A bill against an executor or administrator for a discovery of assets ought to charge positively that assets of the testator

testator or intestate came to his hands. 1 *Chan. Ca.* 226.
Davis v. Curtis.

A bill for a discovery of testator's estate lies before probate, or *pendente lite* for probate. 2 *Vern.* 49. 1 *Vern.* 106.

Bill lies for discovery of the personal estate of *B.* in the defendant's hands after judgment and execution sued against *B.* but not before execution sued. 1 *Vern.* 399. 1 *Eq. Ca. Abr.* 132.

In a bill for discovery of bankrupt's effects, the court will not allow defendants to look into their depositions taken before the commissioners before they put in their answers. *Boden v. Dallow.* 1 *Atk.* 289.

Discovery in equity is not confined to the rules of law for inspecting books. Thus the lord of one manor may have leave to inspect the books of another manor, though not at law. 2 *Ves.* 621. *Dic.*

A cause being brought on to a hearing, where the bill was for a discovery merely, the question was, Whether the bill should be dismissed or the cause struck out of the paper? and the Master of the Rolls ordered the cause to be struck out of the paper, because a bill is never dismissed where the plaintiff prays no relief, for the words of dismissal are, the court seeing no cause to relieve, &c. *Mos.* 185. *pl. Anon.*

Having stated Cases in which a Bill of Discovery will lie, it may not be improper to state some Cases where this Bill will not lie.

A Bill for a discovery of deeds or a title does not lie against him who is a purchaser for a valuable consideration without notice, and hath obtained verdict and judgment in ejectment. *Chan. Rep.* 35.

If a bill be brought against *A.* and *B.* to discover whether *A.* and his wife under whom he claims were not parists, *B.* who purchased from *A.* is not obliged to discover, but may plead. *Harrison v. Southcote.* 1 *Atk.* 539.

No man is obliged to discover what *may* subject him to a penalty, not what *must* only. *Ibid.* 2 *Ves.* 389. 245.

To

To a bill for discovery of marriage, a defendant may plead that it would subject her to punishment for incest in the ecclesiastical court, though the husband be dead. *Brownsword v. Edwards.* 2 *Ves.* 243.

A bill does not lie for a discovery of receipts and acquittances given or payments made for goods after the recovery for the goods in an action at law. 1 *Vern.* 176. *Chan. Rep.* 17.

A bill of discovery does not lie of things not examinable or relievable in equity, as the ill usage of a husband to a wife. 1 *Vern.* 204.

Nor for the discovery of a tenant of the freehold in order to bring a *formedan*. 1 *Vern.* 212. 273.

The court will not compel a discovery to create evidence for a future cause. *Finch v. Finch.* 2 *Ves.* 491.

Upon a bill for a discovery of a deed upon a suggestion of a trust, if the defendant denies the trust he shall not be obliged to produce the deed. 2 *Vern.* 463.

The court will not admit a bill of discovery in aid of the jurisdiction of the ecclesiastical court, for they can come at discovery themselves. *Dunn v. Coates.* 1 *Atk.* 288.

Bill for discovery does not lie against one for what he may be examined to, as one who is merely a witness claiming no interest, but he may plead the case, and support it by answer disclaiming interest, and a demurrer is bad. *Plummer v. May.* 1 *Ves.* 426.

Bill for discovery of waste, charging defendant to be tenant for life, and that he committed waste, and praying that he may set forth and discover whether he is not tenant for life; he may plead to the discovery, whether he hath committed waste or not, but not whether he is tenant for life or not, though on that the forfeiture depends. *Dic.* 2 *Ves.* 108. *Weaver v. Earl of Meath.*

A widow is not obliged to discover an offer to confirm her jointure till the act of confirmation is done. *Leech v. Trollop.* 2 *Ves.* 662.

If plaintiff set out a title, and that certain old terms are standing out, and defendant does not plead, but sets up

a title inconsistent with plaintiff's, he is not obliged to discover what deeds he has relating to his own title; but if there be any charge in the bill that defendant has deeds of plaintiff's title, it must be answered. *Burden v. Dore.* 2 Ves. 445.

To a bill of discovery of title deeds or purchase if he denies notice, need only set forth the purchase deed; and may plead his purchase in bar to the discovery of the title deeds, for a purchaser may, subsequent to his purchase, have found out a defect in his title, and if he should produce title deeds they might be made use of to overturn his title at law. 3 Atk. 302. *Dic. Ashton v. Ashton.*

II. Of Bills not original, but an Addition to or a Continuance of an Original Bill, or both, as

A Supplemental Bill.

A Supplemental Bill in the Nature of a Bill of Revivor.

A Bill of Revivor.

A Bill of Revivor and Supplement.

Of Supplemental Bills.

A Supplemental bill is occasioned by some defect in a suit already instituted, whereby the parties cannot obtain that complete justice to which otherwise the case made by their bill would have intitled them; for although the parties to the suit remain before the court, some subsequent event has either made such a change in their interests, or given such an interest in the matter in litigation to some other person, that the proceedings, as they stand, cannot have their full effect.

It is not very accurately ascertained in the books of practice or in the reports, in what cases a suit becomes defective without being absolutely abated, and in what cases it abates as well as becomes defective; but upon the whole it

may

may be collected, that if by any means the interest of a party in any matter in litigation becomes vested in another, the proceedings are rendered defective in proportion as that interest affects the suit; so that although the parties to that suit remain as before, yet the end of the suit cannot be obtained, and the person to whom such right or property in litigation is transmitted is intitled to supply the defects of the suit if become defective.

Any matter which happens subsequent to the original bill and gives a new interest in the matter in dispute to a person not party to the bill, as the birth of a tenant in tail, or a new interest to a party upon some other contingency, or occasions a change of interest, as an assignment of a mortgage; or where any defect is discovered in the original bill, or in any other part of the proceedings, and not in consequence of any event which has occasioned any change of interest in the subject matter of the suit: sometimes after a decree in aid of it to carry it into execution, where any matter in the original bill hath escaped the attention of the court, or has not been put in issue by it, or by the defence made to it, and no directions have been given respecting such points, or, in fine, any event which makes an alteration with respect to any of the claims of any party to the suit, and does not occasion an abatement, the defect in the proceedings may be supplied by a supplemental bill. And sometimes a defect of parties is supplied by supplemental bill.

A supplemental bill may likewise be brought to obtain a further discovery from a defendant where the proceedings are in such a state that the original bill cannot be amended for that purpose. 3 *Atk.* 370.

A supplemental bill must state the original bill and the proceedings thereon; and if the supplemental bill be occasioned by any event subsequent to the original bill, it must state that event and the consequent alteration with respect to the parties; and in general, the supplemental bill must pray that all the defendants may appear and answer to the charges it contains. For the cause must be heard upon the supplemental bill at the same time that it comes

comes on to be heard upon the original bill, if it has not been heard before ; and if the cause has been heard before, it must in general, if not always, be heard upon the supplemental matter*. If indeed the alteration or acquisition of interest happen to a defendant, or a person necessary to be made a defendant, the supplemental bill may be exhibited against such person alone, and may pray a decree upon the particular supplemental matter alledged against that person only †, unless, which is frequently the case, the interests of the other defendants may be affected by that decree. Where a supplemental bill is meerly for the purpose of bringing formal parties before the court, the parties to the original bill need not be made parties to the supplemental bill.

When a supplemental bill is brought for any new matter discovered since the hearing of the cause, before the former decree is signed and inrolled, if the defendant to such bill is able to shew there is no new matter discovered, he must take advantage by plea or demurrer, and it is too late to insist upon it at the hearing. 2 Atk: 40. *Lewellin v. Muckworth*.

Where assignees of a bankrupt die or are discharged, and others are put in their room, there is no privity between the bankrupt and the assignees, or at least but an artificial one, and therefore they cannot revive, but must bring a supplemental bill to intitle themselves to the benefit of the proceedings in a former suit. 1 Atk. 88. *Anon.*

A purchaser, *pendente lite*, on filing a supplemental bill, is liable to all the costs from the beginning to the end of the suit. *Ibid. Dic.*

The plaintiff brought a supplemental bill for discovery of more evidence touching a matter of account : to which the defendant pleaded the former bill, and that the cause was heard and an account directed ; but he was ordered to answer to all matters in this bill not answered unto in

* 3 Atk. 217.

† *Ibid.*

the former cause, and the plaintiff not to reply or proceed any further without order. 2 *Chan. Rep.* 142. *Bowe v. Shipwith.*

In a bill of review a new supplemental bill may be added, 1 *Vern.* 135. *Price v. Keyte.*

Where a supplemental bill is brought after publication, it is irregular to examine witnesses to a matter that was in issue and not proved in the original cause, and such proofs not to be read.—If there be no proof to the new matter in the supplemental bill, it must be dismissed. *Bagnal v. Bagnal.* *Vin. Abr. tit. Chancery,* 439. C. 8.

Of a Supplemental Bill in the Nature of a Bill of Revivor.

IT may sometimes happen that the suit may become abated as well as defective, where the interest of a plaintiff suing *in auter droit* entirely determines by death or otherwise, and some other person thereupon becomes intitled to the same property under the same title, as in the case of new assignees under a commission of bankrupt, upon the death or removal of former assignees, or in the case of an executor or administrator upon the determination of an administration *durante minori etate*, or *pendente lite*: The suit may be added to and continued by supplemental bill in the nature of a bill of revivor, as it has all the effect of a bill of revivor in continuing the suit.

In a decree to account, if during the account any party should die, and a devisee of that party, or any other formal party as trustees, should be wanting, a bill to bring them before the court is not in the strict sense a supplemental bill, but a supplemental bill in the nature of a bill of revivor. And to such a bill it is not necessary to make the defendants in the original bill parties, nor when the cause comes on to be reheard, can those defendants object for want of parties. 3 *Atk.* 217.

Assignees of a bankrupt bring a bill and obtain a decree *nisi* against defendants, who make default; and after the decree

decree new assignees are chosen, who bring a supplemental bill in the nature of a bill of revivor; they shall stand in the place of the trustees, and may serve the defaulters with a *subpœna* to shew cause. *Brown v. Martin.* 3 Atk. 218.

Of Bills of Revivor.

THE rights of the parties in a suit already instituted may by some subsequent event be so materially changed or varied by discontinuance or transmission, in consequence of marriage or death, as to leave no person for or against whom the court can pronounce.

When a change of interest is occasioned by or in consequence of the death of a party, plaintiff or defendant, whose interest is not determined by his death, as far as the interest of the party dying extends, there is no longer any person before the court: by marriage a female plaintiff renders herself incapable of prosecuting alone; in both these cases the proceedings become abated or discontinued in part or in the whole; but upon the marriage of a female defendant the suit does not abate, though her husband must be named in all subsequent proceedings. The reason of the difference between the cases of a female plaintiff and defendant, seems to be, that a plaintiff seeking to obtain a right, the defendant may be injured by answering to one who is not intitled to sue for it; but a defendant merely justifying possession, the plaintiff cannot be injured by a decree against the person holding that possession. And it has been determined that where a female plaintiff has married, and has notwithstanding proceeded in a suit as a *feme sole*, the mere want of a bill of revivor is not error upon a bill of review brought by the defendant. 1 *Chan. Rep.* 231. *Roll. Rep.* 86.

In bills filed by creditors, the deaths of any of them will not abate the proceedings, because the parties remaining may sustain the suit, and are competent to call upon the court for a decree; or when the interest of the party dying so determines as no longer to affect the suit, as in the

the case of tenant for life, and no person becomes intitled hereupon to the same interest, no discontinuance is occasioned by the death of that party; and in the instance of bills filed by creditors, if one die, the surviving parties can sustain the suit: so if an administrator, as guardian to an infant executor, sue, and, *pendente lite*, the infant come of full age, it is not necessary. And in the case of bills filed by or against trustees or executors, joint-tenants, joint-obligees, joint-obligors, or by or against husband and wife, *jure uxoris*, and the husband dies, the right survives and the proceedings do not abate. If indeed upon the death of the husband of a female plaintiff, suing in her right, the widow does not proceed in the cause, the bill is considered as abated, and she is not liable to costs; but if she take one step in the cause, the suit may proceed without a bill of revivor, for she alone has the whole interest, and the husband was party in her right. 3 *Chan. Rep.* 40. *Toth.* 14.

If there be a bill by a *feme sole*, and before answer she marries, it is not necessary. If a bill be filed against a *feme sole*, who after answer marries, there is no need of a bill of revivor, for the husband shall be concluded by her answer. The case is the same, if a female plaintiff marry, pending a suit, and afterwards, before revivor, her husband die, for then her incapacity to prosecute the suit, is removed.

If bill be brought by husband and wife, for a demand in her right, and he dies, the cause does not abate. 2 *Atk.* 726. *Anon.*

The party plaintiff, or his heirs, executors, or administrators, who have the right of suit by privity of blood, or representation, may exhibit this bill against the other party, his heirs, executors, or administrators, who have his interest.

If a suit abate by marriage of a female plaintiff, and no act be done to affect the rights of the parties, but the marriage, no title can be disputed, the person of the husband is the sole fact to be ascertained, and therefore the suit may be continued by bill of revivor.

A bill of revivor should state the original bill, and the several proceedings thereon, and the abatement; and must shew some title to revive and charge, that the cause ought to be revived and stand in the same condition, with respect to the parties in the bill of revivor, as it was in with respect to the parties to the original bill, at the time the abatement happened, and it must pray that the suit may be revived accordingly. And if there be a variance between that and the original bill, in any material point, the defendant may demur, and upon such demurrer the bill of revivor may be dismissed; but if any thing happens by the abatement that makes it necessary to add a new charge, that may be inserted in the bill, as in the case of a discovery of assets, the plaintiff may pray a discovery of assets in the hands of the heir or executor, and the defendant will be obliged to answer thereto.

Where a defendant to an original bill dies before putting in an answer, the bill of revivor, though requiring in itself no answer, must yet pray that the person against whom it seeks to revive the suit may answer the original bill.

A cause cannot be revived in part, but the whole proceedings, bill, answer, and orders made in the cause must stand revived, for the revivor is but a continuation of the same suit; and it cannot be a continuation of the same unless it proceeded where the other left off. 2 Chan. Ca. 8.

In a bill of revivor merely the defendant must appear in a town cause, in four days exclusive, or in a country cause, in eight days exclusive, of the service of *subpoena*, or, in default, process of contempt may be issued, and in eight days after appearance, either shew cause against the bill or submit to answer; and in default the suit may be revived without answer,—if none be required upon motion as a matter of course. This motion is made upon an allegation, that the time allowed for the defendant to answer by the course of the court is expired, and that no cause is shewn against the bill; and it is therefore presumed defendant can shew no cause against reviving the suit, in the manner prayed by the bill.

No answer is commonly put in to this bill, but the defendant may for his own benefit, by demurrer, plea, or answer, set forth and shew cause against the revivor, as that the now plaintiff is not heir, &c. that he standeth not in the like case, hath not the like interest, or the like cause of complaint, as in the former suit, or that the defendant is not the person subject to the demand.

If defendant by answer only (not by plea or demurrer) insists plaintiff is not intitled to revive, yet the court, on motion, will order the proceedings to stand revived; but if plaintiff does not shew he has a good title to revive, he will take nothing by his suit at the hearing. *Harris v. Pollard*, 3 *Wms.* 348.

If part of the decretal order be omitted in the decree signed and inrolled, the plaintiff may revive the suit by bill of revivor. 1 *Chan. Ca.* 37.

A defendant cannot revive but in one instance, and that is after a decree to account, because in that case he is considered as an *actor*, for till the account is taken it is not known on which side the balance will fall. 3 *Atk.* 691. *Preced. in Chan.* 197.

Though by Stat. 8 *W.* 3. a suit shall not abate by the death of one defendant, yet it must be taken with this restriction, that the subject matter of the bill is not hurt by such defendant's death. *Brown v. Higdon*, 1 *Atk.* 291.

An assignee or a purchaser shall not have a bill of revivor for want of privity. 1 *Vern.* 427. *Eq. Ca. Abr.* 3.

Plaintiff a purchaser exhibited his bill of revivor, and revived the suit by order, and the defendant joined in examining witnesses; but, at the hearing, Lord *Bridgman* dismissed the bill, for that a purchaser could not maintain a bill of revivor. 2 *Freem.* 132.

No one shall be made party to a bill who is not in privity. *Chan. Ca.* 151.

A devisee can not have a bill of revivor, for he does not represent the devisor, but is in nature of a purchaser. 1 *Chan. Ca.* 174.

A bill of revivor lies not upon a decree of long standing, viz. thirty years, and for this reason in the principal case the bill was dismissed, but the party may exhibit an original bill, and set forth the decree as evidence. 2 *Chan. Ca.* 216.

A bill of revivor lies not to revive a decree, for costs alone, where no duty is decreed. 2 *Chan. Ca.* 7. 2 *Chan. Rep.* 195. 246.

A bill of revivor may be brought for duty and costs not taxed in defendant's life-time, but not for costs alone. *Dodson v. Oliver, Bunb.* 160.

If a bill of revivor revive more than it ought, it will be bad. *Chan. Ca.* 77.

A creditor allowed to come in and prove his debt, and pay his contribution, may revive, though he was not plaintiff originally. *Eq. Ca. Abr.* 3.

If the bill of revivor revive the whole decree, which was to pay money and to convey lands, it may stand as to the personality, if the executor only revives, and not as to the realty, though the demurrer to the bill be general. *Eq. Ca. Abr.* 4.

A plaintiff may be omitted in a bill of revivor who was plaintiff to the former bill. 2 *Chan. Ca.* 80.

If the bill of revivor alledge a release by the plaintiff omitted, to the other plaintiffs, and prays an answer, it is no material variance. 2 *Chan. Ca.* 80.

A defendant who has not put in his answer may be omitted in the bill of revivor. 1 *Vern.* 308.

If one plaintiff refuse to join in revivor, the other may bring such bill, and make him who refuses defendant. *Abr. Ca. Eq.* 2.

If an answer to a bill of revivor of part of an order omitted in the inrollment of the decree, draw into re-examination matters formerly settled, an order shall be made, that such matters be not re-examined. *Chan. Ca.* 56.

Revivor upon revivor lies until the interest of the thing in question be determined. *Hard.* 201.

Where assignees of a bankrupt die or are discharged, and others are by order of court put in their room, there is no privity between the bankrupt and assignees, or

least but an artificial one, and therefore they cannot revive, but must bring supplemental bill. 1 *Atk.* 88. *Anon.*

If two joint-tenants or tenants in common exhibit their bill, and one releases or dies, this will not abate the suit as to the other. 2 *Freem.* 6. 3 *Chan. Rep.* 69.

Where the testator had pleaded to a bill, and died before the plea was argued, the representative must plead *de novo*, for the first cannot be argued now. *Micklethwaite v. Calverly and another.* *Cas. temp. Talbot* 3.

A bill of revivor against the defendant's father, for lands, and revived against the defendant as heir, and dismissed with costs, the defendant cannot have costs expended by his father before the revivor, for they died with him. 3 *Chan. Rep.* 65. *Lloyd v. Powis.*

If the suit abates, the plaintiff may bring an original bill, praying a parallel decree, or a bill of revivor, at his election, 1 *Vern.* 463.

In a bill of revivor it may be necessary to insert so much new matter as is needful to shew how the party becomes intitled to revive. *Comyns Rep.* 590.

On bill of revivor plaintiff cannot dispute decree, though defendant may. 2 *Vez.* 232.

Proceedings in cross causes are not revived without a bill of revivor in each, except as to any matter of account decreed, and thus a bill in one cause praying the whole may be revived revives the whole.

Bill of Revivor and Supplement.

A Bill of revivor and supplement is merely a compound of those two species of bills, and in its separate parts must be framed and proceeded upon as such.

If by any act besides marriage as a settlement the rights of the parties are affected, though a bill of revivor merely may continue the suit, so as to enable the parties to prosecute it, yet to bring before the court the whole matter necessary for its consideration, the parties must, by supplemental bill added to and made part of their bill

A bill of revivor lies not upon a decree of long standing, viz. thirty years, and for this reason in the principal case the bill was dismissed, but the party may exhibit an original bill, and set forth the decree as evidence. 2 *Chan. Ca.* 216.

A bill of revivor lies not to revive a decree, for costs alone, where no duty is decreed. 2 *Chan. Ca.* 7. 2 *Chan. Rep.* 195. 246.

A bill of revivor may be brought for duty and costs not taxed in defendant's life-time, but not for costs alone. *Dodson v. Oliver, Bunb.* 160.

If a bill of revivor revive more than it ought, it will be bad. *Chan. Ca.* 77.

A creditor allowed to come in and prove his debt, and pay his contribution, may revive, though he was not plaintiff originally. *Eq. Ca. Abr.* 3.

If the bill of revivor revive the whole decree, which was to pay money and to convey lands, it may stand as to the personalty, if the executor only revives, and not as to the realty, though the demurrer to the bill be general. *Eq. Ca. Abr.* 4.

A plaintiff may be omitted in a bill of revivor who was plaintiff to the former bill. 2 *Chan. Ca.* 80.

If the bill of revivor alledge a release by the plaintiff omitted, to the other plaintiffs, and prays an answer, it is no material variance. 2 *Chan. Ca.* 80.

A defendant who has not put in his answer may be omitted in the bill of revivor. 1 *Vern.* 308.

If one plaintiff refuse to join in revivor, the other may bring such bill, and make him who refuses defendant. *Abr. Ca. Eq.* 2.

If an answer to a bill of revivor of part of an order omitted in the inrollment of the decree, draw into re-examination matters formerly settled, an order shall be made, that such matters be not re-examined. *Chan. Ca.* 56.

Revivor upon revivor lies until the interest of the thing in question be determined. *Hard.* 201.

Where assignees of a bankrupt die or are discharged, and others are by order of court put in their room, there is no privity between the bankrupt and assignees, of

least but an artificial one, and therefore they cannot revive, but must bring supplemental bill. 1 *Atk.* 88. *Anon.*

If two joint-tenants or tenants in common exhibit their bill, and one releases or dies, this will not abate the suit as to the other. 2 *Freem.* 6. 3 *Chan. Rep.* 69.

Where the testator had pleaded to a bill, and died before the plea was argued, the representative must plead *de novo*, for the first cannot be argued now. *Micklethwaite v. Calverly and another.* *Cas. temp. Talbot* 3.

A bill of revivor against the defendant's father, for lands, and revived against the defendant as heir, and dismissed with costs, the defendant cannot have costs expended by his father before the revivor, for they died with him. 3 *Chan. Rep.* 65. *Lloyd v. Powis.*

If the suit abates, the plaintiff may bring an original bill, praying a parallel decree, or a bill of revivor, at his election, 1 *Vern.* 463.

In a bill of revivor it may be necessary to insert so much new matter as is needful to shew how the party becomes intitled to revive. *Gomyns Rep.* 590.

On bill of revivor plaintiff cannot dispute decree, though defendant may. 2 *Vez.* 232.

Proceedings in cross causes are not revived without a bill of revivor in each, except as to any matter of account decreed, and thus a bill in one cause praying the whole may be revived revives the whole.

Bill of Revivor and Supplement.

A Bill of revivor and supplement is merely a compound of those two species of bills, and in its separate parts must be framed and proceeded upon as such.

If by any act besides marriage as a settlement the rights of the parties are affected, though a bill of revivor merely may continue the suit, so as to enable the parties to prosecute it, yet to bring before the court the whole matter necessary for its consideration, the parties must, by supplemental bill added to and made part of their bill

of revivor, shew the settlement or other act by which their rights are affected. And in the same manner if any other event which occasions an abatement is accompanied or followed by any matter which becomes necessary to be stated to the court to shew the rights of the parties, or to obtain the full benefit of the suit beyond what is meerly necessary to shew by or against whom the cause is to be revived, that matter must be set forth by way of supplemental bill added to the bill of revivor.

Of Bills in the Nature of original Bills, though occasioned by or seeking the Benefit of former Bills, viz.

Cross Bills.

Bills of Review to examine and reverse Decrees signed and intolled.

Bills in the Nature of Bills of Review to examine and reverse Decrees, either signed and intolled or not, brought by Persons not bound by the former Decree.

Bills impeaching Decrees upon the Ground of Fraud.

Bills to carry Decrees into Execution.

Bills in the Nature of Bills of Revivor.

Bills in the Nature of Supplemental Bills.

Bills filed by the particular Direction of the Court.

A Cross Bill

IS a bill brought by defendant against a plaintiff or other parties in a former bill depending, touching the matter in question in that bill. A bill of this kind is usually brought

brought to obtain either a necessary discovery or full relief to all parties. It frequently happens, and particularly if any question arises between two defendants to a bill, that the court cannot make a complete decree without a cross bill, or bills, to bring any matter in dispute completely before the court, litigated by the proper parties, and upon proper proofs. In this case it becomes necessary for some or one of the defendants to the original bill, to file a bill against the plaintiff and other defendants to that bill, or some of them, and bring the litigated points properly before the court. Cross bills were at first unwillingly allowed of; the court foresaw great inconveniencies from them, and the rules relating to them were introduced by Sir Nicholas Bacon; they are in the nature of a defence, and were allowed of that the party might more fully have the benefit of somewhat he could not so well profit himself of, being a defendant, though it was at issue in the other cause, but the same matter cannot be examined to after publication. *Mof.* 382. And being generally considered as a defence or as a proceeding to obtain compleat justice of a matter *sub judice*, the plaintiff is not obliged, as against the plaintiff in the original bill, to shew any ground of equity to support the jurisdiction of the court, because the cross bill is grounded upon another bill here in court. *Hard.* 160.

A cross bill should state the original bill and proceedings thereon, and the rights of the party exhibiting the bill, or the ground on which he resists the claims of the plaintiff in the original bill.

The defendant to the original bill must generally answer before the defendant to the cross bill shall be compelled to answer. And in case the plaintiff in the cross cause should attempt to sue out process of contempt, the defendant may obtain an order to stay proceedings upon the cross bill, until defendant to the original cause hath fully answered the same. Defendant to the cross bill will be

intituled to the usual orders, for time to answer the cross bill, after the answer to the original bill is filed.

If the cross bill comes in before issue joined, and plaintiff in such cross bill uses his utmost to get in defendant's answer, the court will stay publication in the original cause, so as to give plaintiff in the cross cause an opportunity to examine, either in the original or cross cause, to the points which may be made by his cross bill. But if the cross bill comes in after publication, or the plaintiff in the cross bill does not stop publication in the original cause, he must proceed to hearing on the depositions already published, for he cannot examine any witnesses after publication in the original cause to the points already examined to.

If a cross bill be put in by the defendant, it should be before publication be past on the first bill, unless the plaintiff in the cross cause will go to hearing in his suit upon those depositions already published, and that for the danger of perjury which might ensue, if the parties should, after publication of the former depositions, examine witnesses *de novo*, to the same matter before examined to. 3 P. x. Alm. 9, 10. *Prac. Reg.* 43.

Original and cross causes are usually brought on together, but if one of the plaintiffs omits to serve *subpœna* to hear judgment, his cause cannot be brought on without the consent of the other side.

Where the defendant in a cross bill, who is plaintiff in the original, is in contempt for not putting in an answer to the cross bill, it is irregular to move to stay the proceedings in the original cause till such answer comes in, but the plaintiff in the cross bill may have publication in the original enlarged to a fortnight after the answer to his bill be come in. *Creswick v. Creswick*, 1 Atk. 291.

The general rule is not to stay proceedings in an original cause till the answer comes in to the cross bill, but to stay publication only. It is of course to stay proceedings in the original cause, if the plaintiff in the cross cause had brought his bill before he has put in an answer to the

Original bill. 1 Atk. 21. *Ramkiffenseat v. Barker, et c contra.*

In all cases of a cross bill filed, after the original cause was proceeded in, a motion to enlarge the time for publication should be *special*, on notice, that the court may judge of it on the circumstances, and not of course, as it is where the original cause is not proceeded in; for otherwise it would be easy to delay the hearing of a cause by keeping this up. *Aylet v. Easy.* 2 Ves. 336.

If a man files a bill and takes out no process upon it, if a cross bill be filed, the plaintiff in the original cause cannot compel the defendant to answer his bill first, he having taken out no process on his bill. *Price v. Lord Coningsby.* Bunb. 124.

The original bill is to be first answered; but if the plaintiff in that bill will, after the cross bill filed, amend his bill in things material, this amended bill, as to the amendments, is a new bill, and the plaintiff in the original bill shall be bound to answer the cross bill, which was filed prior to the amendments made to the original bill, before such time as the said plaintiff in the original bill shall have an answer to his amendments; and as the amended bill must be answered all together, so the priority seems in such case to be lost as to the whole. 2 Wms. 435. *Steward v. Roe.* Vid. etiam 2 Atk. 218. *Long v. Burton.*

A. brings his bill against *B.* and *C.* who put in insufficient answers, and prefer their cross bill against *A.*, *B.* becomes bankrupt, his assignees bring their bill in nature of a bill of revivor against *A.* they shall not go on till *C.* has answered *A.*'s bill. *Child v. Frederick.* 1 Wms. 266.

If there be a bill exhibited in one court of equity, there may be a cross bill in another, as if the mortgagor exhibits a bill to redeem in the Exchequer, the defendant may bring a bill in Chancery to foreclose. 1 Vern. 221.

Of Bills of Review to examine and reverse Decrees signed and inrolled.

THE object of a bill of review is the examination and reversal of a decree made upon a former bill signed and inrolled. No decree shall be reversed, altered, or explained, being once under the Great Seal, but upon bill of review; and no bill of review shall be admitted except it contain either error in law appearing in the body of the decree, without further examination of matters in fact, or some new matter which hath arisen in time after the decree, and not any new proof which might have been used when the decree was made: nevertheless, upon new proof that is come to light after the decree made, and could not possibly have been used at the time when the decree passed, a bill of review may be grounded by the special license of the court, and not otherwise. *Lord Bacon, Ord. 1.*

In case of misrating (being a matter demonstrative) a decree may be explained and reconciled by an order without a bill of review, not understanding by misrating any pretended misrating or misvaluing, but only error in the auditing and numbering. *Lord Bacon, Ord. 2.*

If the bill be founded upon error of law, apparent upon the record, it may be brought *without the leave* of the court; as where an absolute decree is made against a person who upon the face of the decree appears to be an infant; in such case the decree can be reversed upon the ground of apparent error only. When the bill seeks the reversal of a decree enrolled *upon discovery of new matter* existing at the time of pronouncing the decree, but not then in the knowledge of the complainant, an application must be made to the court, supported by an affidavit, stating that the new matter discovered could not be then had or used, and that the party or his agents were not apprized thereof at the time when the decree was made; *praying leave to exhibit this bill*: if it sufficiently appear to
the

the court that new matter upon which such bill is brought has come materially and substantially to the knowledge of the party or his agents, since the time of the decree in the former cause. 2 *Atk.* 178. 2 *Ves.* 576. and that the new matter is relevant and material, and such as probably might have occasioned a different determination, the complainant will be permitted by the court to review the decree signed and inrolled by bill exhibited for that purpose. And in this latter case no bill of review can be exhibited to review a decree signed and inrolled *without leave* of the court *previously* obtained.

Where parties apply for leave to bring a new bill upon new matter discovered after a decree, they must shew that it is relevant; for the court will not, merely because it is new matter, direct a new bill to be brought where it is entirely vain and fruitless. 2 *Atk.* 530.

A bill of this nature should state the former bill and proceedings thereon, the decree and *gravamen* of which the party exhibiting the bill complains, the ground of law or new matter discovered upon which he seeks to impeach the decree; praying that the decree may be reviewed and reversed in the point complained of, if it has not been carried into execution. If it has been carried into execution, the bill may pray the decree of the court to put the party complaining of the former decree into the situation in which he would have been if that decree had not been carried into execution, and a writ of *subpœna* to appear and answer.

When a bill of review is grounded upon discovery of new matter, an affidavit must be made by the complainant, stating that such new matter was subsisting at the time of pronouncing the decree, and that it came within his knowledge since the hearing, and of which he or his agents were not at that time apprized, and which could not be had or used at that time. Fifty pounds must be also deposited with the register, and a certificate thereof obtained. And on application by motion, and upon hearing the affidavit read and producing the certificate, the court will exercise its

its discretion whether to permit such bill to be filed or not: if the application be made by petition, the affidavit must be annexed to the petition, and a certificate from the register of the deposit as above.

A bill of review upon an error in law apparent upon the face of the record may be filed without leave of the court, making a deposit of 50*l.* and no affidavit is required.

Upon every bill of review to reverse a decree, the plaintiff must deposit 50*l.* in order to answer the costs of such bill to the defendant, otherwise if the bill of review be brought to reverse a decree upon new matter, as upon a decree discovered by the plaintiff since the former decree, in such case the plaintiff in the bill of review must have the leave of the court for filing such bill, though there is no need of leave if the bill of review be brought to reverse a decree upon error appearing on the face thereof; but in the principal case the plaintiff having deposited 50*l.* and annexed an affidavit to the bill that the deed on which the bill of review was founded did first come to the plaintiff's knowledge, after the pronouncing the decree, the court allowed the bill of review, upon the plaintiff's paying the costs of the defendant's motion, which was to dismiss the bill, for that it was filed without the leave of the court. 2 *Wms* 283. *Anon.*

Obedience should be paid to the sentence as far as it can be paid without prejudice to the right of the party in the cause so to be reviewed; for if obedience be not paid to the sentence, it is presumed that such bill of review is only brought for delay, and not upon any real grievance to the party; but where the sentence is performed in manner aforesaid, there it is plain it is for the sake of right, and not for delay.

No bill of review shall be admitted, or any other new bill to change matter decreed, except the decree be first obeyed and performed: as if it be for land, that the possession be yielded; if it be for money, that the money be paid;

be for evidences, that the evidences be brought in :
so in other cases which stand upon the strength of the
decree alone. *Lord Bacon, Ord. 3.*

Plaintiff must perform the decree in all cases wherein
the court can set him in as good a state again as he was,
in case the former decree happen to be reversed. *Totb. 42.*
Prac. Reg. 52.

But if any act be decreed to be done which extinguish-
eth the parties right at the common law, as making of as-
surance or release, acknowledging satisfaction, cancelling
bonds or evidences, and the like ; those parts of the decree
are to be spared until the bill of review be determined ;
but such sparing is to be warranted by public order made
in court. *Lord Bacon, Ord. 4.*

In case money be decreed, the court may dispense with
the payment of it upon giving good security. *1 Chan. Ca.*
42. Prac. Reg. 52.

Per Cur. In a bill of review all things are to be per-
formed according to the former decree that do not ex-
tinguish the right, otherwise the non-performance is a
good plea in bar, as if writings are to be brought into
court, or costs paid, but not to release the right, or make
a conveyance, because that would destroy the right. *2 Freem.*
88. Mitton v. Lord Maxefield.

If the bill be brought to review the reversal of a former
decree, it may pray that the original decree may stand.
2 Chanc. Prac. 634. The bill may also, if the original
suit hath become abated, be at the same time a bill of re-
vivor. *2 Pr. Al. Cur. Canc. 522.* A supplemental bill
may be added to a bill of review, if any error has happen-
ed which requires it. *1 Vern. 135.*

No witnesses which were or might have been examined
to any thing in issue in the original cause shall be examined
to any matter on the bill of review, unless it be to any
matter happening subsequent which was not before in issue,
or upon matter of record or writing not known before.
Prac. Reg. 52. Gilb. Chanc. 186. Totb. 173.

Where

Where a matter in fact was particularly in issue before the former hearing, though you have new proof of the matter, upon that you shall never have a bill of review but where a new fact is alledged that was not at the former hearing, there it may be a ground for a bill of review
2 Freem. 31. Anon.

None but parties and privies, as heirs, executors and administrators, can have this bill of review, since no body else can be aggrieved by such decree. *Prac. Reg. 5. Gilb. Chanc. 186.*

A devisee is not intitled to a bill of review being not in privy to the testator against whom the decree was made. *Slingby v. Hale. 1 Chan. Ca. 123.*

Assignee cannot in any case have a bill of review. *Arg. 1 Vern. 417. Barbonne v. Searle.*

When a decree is neither signed nor inrolled a bill of review cannot be brought, but a supplemental bill in the nature of a bill of review, if any new matter be discovered since the decree. *2 Atk. 40.*

The party generally puts in the usual demurrer that there is no error in the decree, he rarely or ever answers unless ordered thereto by the court, and the demurrer being set down to be argued, the court proceeds to affirm or reverse the decree, and the prevailing party takes the deposit. *Gilb. Chan. 187.*

When a bill of review is brought for error apparent, the constant method is for the defendant to put in a plea and demurrer, a plea of the decree and a demurrer against opening the inrolment, so that in effect a bill of review cannot be brought without having the leave of the court in some shape; for if it be for matter apparent in the body of the decree, then, upon the plea and demurrer of the defendant to the bill, the court judges whether there are any grounds for opening the inrolment; if it be for matter come to the plaintiff's knowledge after the pronouncing the decree, then, upon a petition for leave to bring a bill of review, the court will judge if there be any foundation for such leave. *2 Atk. 534. Gould v. Tancred.*

The court would not grant a bill of review after an account had been directed and taken on a foreclosure bill, and the report confirmed some years before, and it appearing the defendant's agent and attorney and solicitor attended the matter for him. *Ibid. ut supra.*

When twenty years have elapsed from the time of pronouncing a decree, and the decree has been signed and inrolled, a bill of review cannot be brought. *1 Brown's Parl. Ca. 95. 1 Vern. 287. 3 Atk. 38.*

When arguing a demurrer to a bill of review nothing can be read but what appears on the face of the decree; but after the demurrer is over-ruled the plaintiffs are at liberty to read bill and answer, or any other evidence as at a rehearing, the cause being equally open. *1 Atk. 290. Catteral v. Purchase.*

Papers in the hands of a party to a former cause after publication had passed, though not produced then, may be read upon a bill of review; for not being discovered till after publication in the cause, they could not possibly be made use of then. *2 Atk. 179. Standish v. Radley. 3 Atk. 35.*

If a decree be obtained and inrolled, so that that cause cannot be reheard upon petition, there is no remedy but by bill of review, which must be on error appearing on the face of the decree, or on matters subsequent thereto, as a release or receipt discovered since. *3 Wms. 371. Taylor v. Sharp.*

No new bill after a bill of review. *2 Chan. Ca. 133.*

A bill having been taken *pro confesso*, a bill of review was brought, and a demurrer having been put in to it was allowed; and now a new bill of review being brought, defendant demurred, and for cause shewed that a bill of review lies not after a bill of review; and the demurrer was allowed. *1 Vern. 135. Dunny v. Filmore.*

A man cannot bring a bill of review after a demurrer allowed to a former bill of review. *1 Vern. 441. Pit v. Ld. Arglosse.*

Plaintiff not allowed to bring a bill of review unless he performed the decree, or would swear he was unable to do it,

it, and would surrender himself to the *Fleet*, to lie there till the matter on the bill of review was determined. 1 *Vern.*

117. *Williams v. Mellish.*

Upon a bill of review the party cannot assign for error that any of the matters decreed are contrary to the proof in the cause, but must shew some error appearing in the body of the decree, or new matter discovered since the decree made. *Ibid.*

Plaintiff allowed to bring a bill of review without paying the costs decreed in the original cause, upon making oath he was not worth 40 l. besides the matter in question. 1 *Vern.* 262. *Fitton v. Com. Macclesfield.*

But this order for dispensing with the costs upon bringing a bill of review ought to be set forth in the bill of review. Arg. 1 *Vern.* 292. S. C.

Where a demurrer to a bill of review is allowed, it may be inrolled; but if over-ruled, that cannot be inrolled so as to prevent the demurrer's being re-argued. 2 *Vern.* 120. *Woots v. Tucker.*

A fine and non-claim a good bar to a bill of review, if the party be not in prison, &c. Arg. 2 *Vern.* 190. *Lingard v. Griffin.*

When a decree comes to be reversed on a bill of review, it ought to be either because it was *unjust in matter of law*, arising within the body of the decree, or for that the court wanted or exceeded its jurisdiction. *Per North K.* 1 *Vern.* 292.

Upon a bill of review no proofs are to be admitted but such as were in the original cause. *Nelf. Ch. Rep.* 196. *Taylor v. Wood.*

It was objected against the bill of review, that they had assigned errors collected from the proofs in the cause that did not appear in the body of the decree. But the Lord Keeper observed, that was occasioned by the ill way they had got of late in drawing up decrees in general, without particularly stating the matters of fact; and said the plaintiff in a bill of review should not be concluded by it, unless the matter

there t
1 Vern. *William v. Newcomb.*

debate arose touching the stating of the matters of
in a decree, and it was complained that the registers
drew up decrees in such a manner as that no bill of
could be brought; for they only recite the bill and
answer, and then add, that upon the reading the proofs,
and hearing what was alledged on either side, it was decreed
so and so; and never mention what particular facts were
alleged by the court to be sufficiently proved, and what
not, that so upon a bill of review it might appear to the
court, what facts the decree was grounded on. The Lord
Keeper declared he would not allow of that way of drawing
up decrees in general; but that the facts that were proved
should be particularly so mentioned in the decree, *otherwise*,
if a bill of review was brought, *those facts should be taken as*
not proved, for else a decree could never be reversed by a
bill of review, but all erroneous decrees must be reversed
upon appeals. 1 Vern. 214. *Brend v. Brend.*

There can be no bill of review for any matter which might
have been made use of in the first cause, or for any matter subse-
quent to the decree, as the plaintiff's confession. 2 Freem.
172. *Curtis v. Smallbridge.*

Defendant answered bill of review, but so as that some
matter in his answer would bring into examination some
part of the decree as it was signed and inrolled; on which
answer as to that part Serjeant *Fountaine* drew a demurrer,
because this would tend to perjury and infiniteness to re-
examine things examined and decreed; of which opinion
the court was; but as well the defendant's council as the
court said, there could be no demurrer upon an answer
in equity. Serjeant *Glyn* for the plaintiff said he had known
it, the court made an order that there should be no examina-
tion of that which had been examined. 2 Freem. 181.
Williams v. Owen.

A bill of review will not lie but against those who were
parties to the original bill; as where *J. S.* mortgaged lands

to *A.* in fee for 1000*l.* and covenanted and gave bond to pay the money forfeited. *A.* died leaving *G.*'s wife his heir at law. *G.* and his wife brought a bill against *J. S.* for payment of the money, or else *J. S.* to be foreclosed, and it was decreed accordingly; but *J. S.* did not pay the money according to the decree: but upon discovering that *A.* had made a will and had given this money to his executors, *J. S.* brought a bill, desiring that he might be admitted to pay the money to the executor, he having the right, and no party to the former decree: this was by original bill, and not by bill of review: and in this case a bill of review would not lie, because the executor was no party to the former decree. *Earl of Carlisle and others v. Glover and others*, 2 *Freem.* 148.

Bill of review; demurrer generally that the decree contained no error in law, and that the matters alleged for error were but mis-judgments; and on debate was declared, that on a bill of review the cause of review must arise and appear upon the case as stated in the decree, and that the fact must be admitted as there stated; and though the fact whereon the court gave judgment was mistaken, yet there is no ground for a bill of review after decree inrolled, but the fact in this case must be admitted true and the decree inrolled is matter of record, and can be tried only by the record; but in mistaking the fact the proper course had been to have gotten the cause reheard before the decree had been signed and inrolled. And the reason in this case why the review did not lie was, because as the decree was drawn up, there was no error appearing in it. *Combes v. Proud*, 2 *Freem.* 182. 1 *Chan. Ca.* 54. S. C.

If a man hath less decreed for him than he would have he shall not bring a bill of review. A bill of review lies only for him against whom the decree or dismissal is; ruled on demurrer. *Glover v. Perlington*, 2 *Freem.* 182. *Chan. Ca.* 51.

Defendant

Defendant had a decree for money, plaintiff by bill of review reversed this decree and the money decreed to the plaintiff. *Cur.* On search of precedents the defendant shall pay damage for this money. 2 *Freem.* 181. *Jackson v. Eyre, Nelf. Ch. Rep.* 83. *Jackson v. Digry.*

Bill to establish right of common, and to set aside several former decrees: demurrer to the whole bill; for if there were any error in the former decrees, they ought to have brought bill of review: demurrer allowed. *Lady Granvill and others, commoners of Epsom, v. Rameden and others. Bunb.*

If the decree has not been signed and inrolled, a decree may be examined and reversed upon a species of supplemental bill in the nature of a bill of review, where any new matter has been discovered since the decree. 2 *Atk.* 40. 3 *Atk.* 811.

A decree not signed and inrolled being liable to be altered upon a re-hearing, and not requiring a bill of review if there is sufficient matter to reverse it appearing upon the former proceedings, the investigation of the decree must be brought on by petition of rehearing. 2 *Ves.* 598. And the office of the supplemental bill in nature of a bill of review is to supply the defect which occasioned the decree upon the former bill; and it is a very fruitless thing to put a man to sign and inrol a decree which is made against himself, in order to intitle him to bring a bill of review, besides the great expence which attends it. 2 *Atk.* 178. It is necessary to obtain leave of the court to bring a supplemental bill of this nature, for by an order made 17th day of *Oct.* 1741, by Lord *Hardwicke*, reciting, that no bill of review, grounded upon new matter discovered since the decree complained of, ought to be exhibited without special leave, and a deposit of 50 *l.* as a pledge to answer costs and damages—That in certain cases, where the former decree had not been signed and inrolled, a petition had been preferred to rehear the original cause, and a supplemental or new bill, in nature of a bill of review, ground-

ed upon new matter, had been brought to reverse or vary such former decree without leave or deposit, *It was ordered* that no supplemental or new bill, in nature of a bill of review, grounded upon any new matter discovered or pretended to be discovered since the decree to reverse or vary such decree, shall be exhibited without special leave, and unless a deposit be made of so much money as together with the deposit by the rules of the court to be made on rehearing will make up 50 *l*.

**Of Bills in the Nature of Bills of Review,
to examine and reverse Decrees either signed
and enrolled or not, brought by Persons
not bound by the Decree.**

IF a decree be made against a person who had no interest at all in the matter in dispute, or had not such an interest as is sufficient to render the decree against him binding upon some person claiming after him, relief may be obtained against error in the decree by a bill in the nature of a bill of review. Thus if a decree be made against a tenant for life only; a remainder-man in tail or in fee cannot defeat the proceedings against the tenant for life but by a bill shewing the error in the decree, the incompetency in the tenant for life to sustain the suit and the accruer of his own interest; and thereupon praying that the proceedings in the original cause may be reviewed, and for that purpose that the other party may appear to and answer the new bill, and that the rights of the parties may be properly ascertained. A bill of this nature, as it does not seek to alter a decree made against the plaintiff himself, or against any person under whom he claims, may be filed without the leave of the court.

Of Bills impeaching Decrees upon the Ground of Fraud.

IF a decree has been obtained by fraud, it may be impeached by original bill without leave of the court. There do not appear in the books many instances of such bills in cases of direct fraud in obtaining a decree: but it seems to have been considered, that where a decree has been made against a trustee, the *cestui que trust* not being before the court and the trust not discovered; or against a person who has made some conveyance, or incumbrance not discovered; or where a decree has been made in favour of, or against an heir, when the ancestor has in fact disposed by will of the subject matter of the suit; the concealment of the trust, or subsequent conveyance, or incumbrance, or will, in these several cases ought to be treated as a fraud.

Bill to redeem, stating that plaintiff's late father mortgaged lands to J. S. and that defendant prevailed with plaintiff's father to consent to an assignment of the mortgage to defendant under a pretence of helping him to a place, that the mortgage was assigned to defendant accordingly, and that defendant never helped him to any place, but the next term after the mortgage was forfeited, defendant brought ejectment and turned plaintiff's father out of possession and filed his bill to foreclose against plaintiff's father, who put in an answer, and then defendant procured a man to make an affidavit that plaintiff's father had left his habitation and was gone beyond sea, and got an order that service on defendant's clerk in court might be good service; whereas plaintiff's father appeared publicly, and had not left his place of residence; that upon this false affidavit and order made thereupon the cause was heard *ex parte*, a report made *ex parte* and confirmed absolutely, and plaintiff's father was absolutely foreclosed.—Defendant pleaded this decree signed and inrolled. *Per cur.* All the circumstances of fraud ought to be answered—the decree being signed and inrolled plaintiff has no other remedy.

68 Of Bills impeaching Decrees, &c.

Plea over-ruled, An objection without effect was made that by this rule a decree might be set aside by an original bill. 2 *Wms.* 73. *Lloyd v. Mansel.* 3 *Wms.* 111. 1 *Brown Parl. Caf.* 414. 3 *Atk.* 811. *Rep. temp. Talbot* 201. 1 *Chan. Caf.* 151.

Bills to carry Decrees into Execution.

FROM the neglect of parties or some other cause it may become impossible to carry a decree into execution without the further decree of the court. This happens generally in cases where the parties having neglected to proceed upon the decree, their rights become so embarrassed by a variety of subsequent events, that it is necessary to have the decree of the court to settle and ascertain them. Sometimes such a bill is exhibited by a person who was not a party, nor claims under any party to the original decree; but claims in a similar interest, or is unable to obtain the determination of his own rights till the decree is carried into execution. Or it may be brought by or against a person claiming as assignee of a party to the decree.

A bill for this purpose is partly an original bill, and partly a bill in the nature of an original bill, though not strictly original. Sometimes it is likewise a bill of revivor, or a supplemental bill, or both.

A *feme covert*, after separation from her husband, had a decree for alimony, which was confirmed on a bill of review; but the husband, being willing to be reconciled to his wife, and to cohabit with her, exhibited an original bill to set aside the decree, and it was held *per Finch* Ld. Keeper, assisted by C. J. *North* to be a proper bill. *Whorewood v. Whorewood* 1 *Chan. Ca.* 250. where it said to have been resolved, that where a decree is temporary, or for special ends, an original bill lies to shew that the purposes of the decree are satisfied, and to put a period to it. *Vid. etiam Lawrence v. Burney.* 2 *Chan. Rep.* 128.

An original bill to execute a decree of lands against a purchaser, who claimed under parties bound by that decree,

Bills to carry Decrees into Execution. 69

Decree, was allowed good on demurrer thereto by the Lord Keeper. *Organ v. Gardiner.* 1 *Chan. Ca.* 231.

If a bill be brought to have the benefit of a former decree, the plaintiff cannot examine witnesses, much less the same witnesses, to the matters in issue in the former cause: on such a bill the court may examine the justice of the former decree, but then it must be by proofs taken in the cause wherein that decree was made. 2 *Vern.* 409, 226. 1 *Chan. Ca.* 45. No original bill ought to be brought to explain a decree on any matter precedent to the decree. *Dic.*

Of Original Bills in the Nature of Bills of Revivor.

IF the death of a party whose interest is not determined by his death, is attended with such a transmission of his interest that the title as well as the person intitled may be litigated in this court, as in the case of a devise of a real estate, the suit is not permitted to be continued by a bill of revivor. An original bill must be filed, upon which the title may be litigated in this court, as in the case of a devise, the suit cannot be continued by or against the person to whom the interest is so transmitted by bill of revivor. 3 *Ch. Rep.* 39. 1 *Chan. Ca.* 123. The person intitled to the benefit of the former proceedings must exhibit an original bill in the nature of a bill of revivor. On this bill the benefit of the former proceedings is absolutely obtained, so that the pleadings in the suit, and the depositions of witnesses, if any have been taken, may be used as if taken or filed in the second suit: and if any decree has been made in the first cause, the same decree shall be made in the second.

A bill for this purpose must state the original bill, the proceedings upon it, the abatement, and the manner in which the interest of the party deceased has been transmitted, and it must charge the validity of the transmission and state the rights which have accrued by it. A bill of

this nature is said to be original merely for want of that privity of title between the party to the former and the party to the latter bill, though claiming the same interest, as would have permitted the continuance of the suit by bill of revivor. For this bill, in itself original, has so far the effect of a bill of revivor, that if the title of the representative substituted by the act of the dead party be proved, or admitted by the persons having right to contest it, the same benefit may be had of the proceedings as if the suit had been continued by bill of revivor : therefore the party to the new bill shall be equally bound by or have advantage of the proceedings on the original bill, as if there had been such privity between him and the party to the original bill claiming the same interest.

A devisee brings an original bill in the nature of a bill of revivor. The question was, whether the defendant shall be at liberty to make a new defence. *Lord Keeper*. Where the bill, although original, is only to supply the want of privity, and in all other manner but as a bill of revivor, I think the decree ought to be carried on in the same manner as it would have been upon a bill of revivor, if the plaintiff had claimed in privity. There is no reason why the devisee should not have the same advantage of the decree as an heir or executor, without entring again into the merits of the cause ; and the decree ought to be neither longer or shorter than the first decree. 2 *Vern.* 548. *Clare v. Wordell.* 1 *Eq. Ca. Abr.* 83.

Defendant, as devisee against whom a decree had been made, exhibited an original bill in the nature of a bill of revivor. *Per Cur.* Defendant is not at liberty to enter into the merits of the cause, and question the justice of the decree ; for had it been a bill of revivor by the heir, he could not have been heard ; and a devisee shall not be in a better condition than an heir. *Hæres natus* is rather to be favoured than *hæres factus*. 2 *Vern.* 672. *Minsbush v. Lord Mohun.*

Bill of partition brought by several persons : one dies who devises his part to co-plaintiff and makes him executor ; he brings a bill of revivor, to which it was demurred : said that bills of revivor and bills in nature of revivor are very different : a bill of revivor can only be by the heir as to the realty, and by an executor or administrator as to the personalty ; on bill of revivor the estate continues the same as before abatement, but here, in case of a devisee who is a purchaser, the estate is altered, and a purchaser can never revive : demurrer allowed, but leave given to amend the bill and revive as executor : and an original bill in nature of a bill of revivor as devisee was thought the most proper method. *Huet v. Lord Say & Seal. Sel. Caf. in Ch. 53.*

Of Original Bills in the Nature of Supplemental Bills.

IF the interest of a plaintiff or defendant suing or defending in his own right, wholly determines, and the same property becomes vested in another person not claiming under him ; as in the case of an ecclesiastical person succeeding to a benefice, or a remainder-man in a settlement becoming intitled upon the death of a prior tenant under the same settlement : the suit cannot be continued by bill of revivor, or its defects supplied by a supplemental bill. For though the successor in the first case and the remainder-man in the second have the same property which the predecessor or prior tenant enjoyed ; yet they are not in many cases bound by his acts, nor have they in some cases precisely the same rights. But in general, by an original bill in the nature of a supplemental bill, the benefit of the former proceedings may be obtained.

If the party whose interest is thus determined was not the sole plaintiff or defendant, or if the property which occasions a bill of this nature affects only a part of the suit,

the bill as to the other parties and the rest of the suit is supplemental merely.

To this bill a new defence may be made ; the former pleadings and depositions cannot be used as if filed or taken in the same cause : and the decree, if any has been made, is no otherwise of advantage than as it may be an inducement to the court to make a similar decree.

A bill for this purpose must state the original bill, the proceedings upon it, the event which has determined the interest of the party by or against whom the former bill was exhibited, and the manner in which the property has vested in the person become intitled. It must then shew the ground upon which the court ought to grant the benefit of the former suit to or against the person so become intitled, and pray the decree of the court adapted to the case of the plaintiff in the new bill.

This bill, though partaking of the nature of a supplemental bill, is not an addition to the original bill, but another original bill, which in its consequences may draw to itself the advantage of the proceedings on the former bill.

Of Bills filed by the particular Direction of the Court.

UPON hearing a cause it sometimes appears, that the suit already instituted is insufficient to bring before the court all matters necessary to enable it fully to decide upon the rights of all the parties. This frequently happens where persons in opposite interests are co-defendants, so that the court cannot determine their opposite interests upon the bill already filed, and the determination of their interests is yet necessary to a complete decree upon the subject matter of the suit. In such a case, if upon hearing the cause the difficulty appears, and a cross bill has not been exhibited to remove the difficulty, the court will direct a bill to be filed, in order to bring all the rights of all the parties fully, and properly

properly for it's decisions; and will reserve the directions or declarations, which it may be necessary to give, or make, touching the matter more fully in litigation by the former bill, until this new bill be brought to a hearing.

Informations.

SUITS instituted on behalf of the Crown, or of those who partake of its prerogative, or for whom it is trustee, are carried on by the King's Attorney or Solicitor-general.

As these officers of the Crown are supposed to act in this instance merely officially, the bill they exhibit is by way (not of complaint, but) of information to the court, of the rights which the Crown claims, on behalf of itself or others, and of the invasion or detention of those rights, for which the suit is instituted.

If the suit do not *immediately* concern the rights of the Crown, its officers are not supposed to have any personal knowledge of the matter, but to depend on the relation of some person whose name is inserted in the information, and who is termed the *relator*. It sometimes happens that that person has an interest in the matter in dispute, of the injury to which interest he has a right to complain. In this case his personal complaint being joined to and incorporated with the information given by the officer of the Crown, they form together an *information and bill*, and are so termed.

But if the suit *immediately* concern the rights of the Crown, the information is generally exhibited without a relator.

Where a relator in such a case has been named, it has been done through the tenderness of the officers of the Crown towards the defendant, that the court might award costs against the relator if the cause should seem to be improperly instituted, or in any stage of it improperly conducted. The propriety of naming a relator for
this

this purpose, and the oppression arising from a contrary practice, were particularly noticed by Mr. Baron Perrot in a cause in the Exchequer, *Attorney-general v. Fox*. In that cause no relator was named; and though the defendants finally prevailed, they were put to an expence almost equal to the value of the property in dispute.

Informations in every respect partake of the nature of bills, except in their style. And if there are several relators, the death of any of them while there survives one will not affect the suit. But if all the relators die, or if there be but one, and that relator die, the court will not permit any further proceedings till an order has been obtained for liberty to insert the name of a new relator, and such name is inserted accordingly.

The proceedings upon an information can only abate by the death or determination of interest of the defendant.

The information must be drawn, or perused, and signed by council, and his Majesty's Attorney or Solicitor General must also sign it, whose fee on this occasion is according to the length. The same method is to be observed in drawing and filing informations, as before laid down in respect to bills; for the complaint being offered to the court by way of information, either at the instance of a party interested or otherwise, and being a proceeding *ex officio*, no leave is required as at law.

An information concerning the rights of the Queen, is exhibited in the name of her Attorney or Solicitor General.

In a suit on behalf of a charity for the arrears of a rent charge, it is not necessary to make all the tenants of the land out of which the rent issues parties. 1 *Wms.* 599. *Attorney General v. Wybrugh & al.*

On an information for a charity, though the title be mistaken, if a right appears it must be established. 2 *Ves.* 426.

In an information by the Attorney General for the regulation of a charity, it is the business of the court to give a proper direction as to the charity, without any regard at all to the propriety or impropriety of the prayer of the in-

information ; and this case herein differs from all others, wherein the decree must be founded on the prayer in the plaintiff's bill. 1 *Atk.* 355. *Attorney General v. Jeanes.*

It is not absolutely necessary that relators in an information for a charity should be the persons principally interested, for the court will take care at the hearing to decree in such a manner as will best answer the purposes of the charity ; and therefore any persons, though the most remote in the contemplation of the charity, may be relators. 2 *Atk.* 328. *Attorney General v. Bucknall.*

Subpoena.

A *Subpœna* in Chancery is a mandatory writ or process issuing under the great seal, directed to a party summoning him to appear under a penalty, generally *subpœna centum librarum*, to answer to such things as are objected against him ; from which emphatical words it derives its name.

The *subpœna* was anciently and originally a process in the courts of common law, in order to bring in a witness to attest the truth ; and it is a summons to the party under a penalty to appear and give his testimony. This process was therefore taken up by the High Court of Chancery, when a man was convened to answer upon oath, as to the truth of the plaintiff's allegations, because it was the nearest process that was used in case of attestation by the common law. And this was formed after the manner of citations by the civil and canon law, in which it was necessary to insert the names of the defendants, and also of the plaintiffs at whose suit, and at what time and place they were to appear.

John Waltham, Bishop of *Salisbury* and Lord Keeper, invented the writ of *subpœna & certis de causis*, in the reign of *Richard II.* 3 *Selden.* 1544. Some abuses having been occasioned by the imprudent issuing of it upon false and groundless allegations, and the court itself advancing by too

hasty

hasty strides to controul the common law; a statute was enacted in the seventeenth of that King, enabling the Chancellor for the time being to award damages according to his discretion to persons compelled to come before the King's council, or in the Chancery, by writs grounded upon untrue suggestions, after such suggestions duly found and proved untrue.

The Stat. 15th Hen. 6. c. 4. in the preamble states: For that divers persons have been greatly vexed and grieved by writs of *subpœna* purchased for matters determinable by the common law of this land, to the great damage of persons so vexed, and in subversion and impediment of the common law aforesaid, enacts that the statutes thereof made shall be duly observed. And that no writ of *subpœna* be granted from henceforth until surety be found to satisfy the party so grieved and vexed for his damages and expences, if so be that the matter cannot be made good which is contained in the said bill.

The restriction as to giving security to satisfy damages and expences hath gradually worn away, and at length entirely vanished, unless it be in the case of a complainant residing out of the jurisdiction of the court, and he may be compelled to give security in the sum of 40 l.

A *subpœna* to appear and answer is the first and leading process of this court in suits instituted on the equity sides; it requires the party against whom the complaint is made to appear and answer at a certain time and place therein mentioned. By Stat. 3 & 4 Ann. c. 16. No *subpœna* or other process for appearance shall issue till after the bill is filed with the proper officer, and a certificate thereof brought to the *Subpœna*-office, except in cases of bills for injunctions to stay waste or stay suits at law commenced. And although solicitors, through ignorance or inattention, frequently sue out and serve this writ before the bill be filed, taking care to file the bill on the return day; yet that practice is altogether irregular (except in cases in the Stat. excepted) and the complainant does it at the risk of costs;

to prevent which the Six-clerk will sometimes antedate the bill : but by an order made by Lord *Clarendon*, "All bills are to be dated the same day they are brought into the Six-clerks office, and no Six-clerk to presume to antedate any bill." *Ord. Canc.* 93. And in this case if defendant be served with this writ, and before the return he instructs a clerk in court to search if any bill be filed, and it appears no bill is filed, he may prefer costs, unless it be an injunction cause.

A *subpoena* out of this court may be made returnable in the Mayor's court or in the Chancery in *Ireland* in certain cases, but then no attachment issues here for a contempt. 1 *Vern.* 406, 420.

It was formerly the practice after filing the bill to procure a certificate thereof from the Six-clerk in the cause pursuant to the statute of *Ann.* which ran in the following form :

Inter *A. B. Quer.* and *C. D. et al. Defend.*

I do hereby certify that the bill in the said cause is filed in my office. Dated this 20th day of *June* 1715.

Thomas Bridges, Clerk.

For which certificate no fee was to be paid, and without a certificate a *subpoena* could not issue.

The present practice hath rendered such certificate unnecessary.

This writ hath two returns, the *ordinary* and *extraordinary*.

The *ordinary* return is upon a general return day, or any day certain in term ; for ordinarily no *subpoena* is returnable in the vacation. To obtain this writ the Solicitor makes out a *præcipe* thus,

Subpoena. John Doe to appear in Chancery returnable —
at the suit of Richard Roe, Gent.

Dated 4th March, 1783.

Hampden Solicitor.

This he leaves at the *Subpoena*-office with 5 s. if one or two defendants ; but if there are three defendants, he
pays

pays 6*d.* more for the additional label: after the *subpœna* is sealed, it is left at the *Subpœna* office till the Solicitor calls for it. The Clerk in court, if he sues out the *subpœna*, usually gives the above *præcipe* to the Bag-bearer of the office, and after it is sealed he leaves it at the Clerk's seat in the Six-clerks office.

The writ runs in this form—

GEORGE the third, by the grace of GOD, of *Great Britain, France, and Ireland*, King, defender of the faith, &c. to *John Doe* greeting: For certain causes offered before us in our Chancery we command and strictly enjoin you, that laying all other matters aside, and notwithstanding any excuse, you personally be and appear before us in our said Chancery (*return-day or immediately after the receipt of this writ, if it be made returnable immediate*) wheresoever it shall then be, to answer concerning those things which shall be then and there objected to you, and to do further and receive what our said court shall have considered in this behalf; and this you may in no wise omit, under the penalty of one hundred pounds; and have there this writ. Witness Ourself at *Westminster*, the tenth day of *June*, in the twenty-third year of our reign.

Courtenay v. Courtenay.

Indorsed. This writ is at the suit of *John Long*.

Label. *John Doe* to appear in Chancery, returnable (the 6th day of *November* next, or instant, as it may be) at the suit of *John Long*.

Courtenay v. Courtenay.

The purport for which each *subpœna* issues is expressed by indorsement on the writ itself, and also on the label, and must be in the *præcipe* when left.

The *extraordinary* return of this writ is *immediate*, and in the time of vacation, and a *subpœna* so returnable is never made out without an order for that purpose, which can be obtained only when the defendant resides in *London*, or within

ten miles thereof; an application must be made to the court by motion or petition, praying an order for a *subpœna* with such return: for this purpose a proper affidavit must be made of defendant's residence (*see tit. Affidavit*) which is usually sworn before the Master at the public office in *Symonds-Inn*, and having given instructions to council, with the affidavit to move for a *subpœna* returnable immediately after the motion is granted, the affidavit must be filed at the Affidavit-office, in *Staples-Inn*; and having got a certificate thereof, the council's brief and the certificate must be brought to the Register-office and the order bespoken, with which 4s. 6d. is to be left; the next step is to pass the order at the same office, and a copy of it being made and carried with the order itself to one of the entering clerks in the same office, he will mark it entred, for which 1s. 6d. is to be paid, and the order and *præcipe* being carried and left at the *Subpœna*-office, the clerk will make out the writ.

If the plaintiff proceeds by petition, as is most usual, an affidavit must be made as before, and a petition engrossed (*see tit. Petition*) on treble six-penny stamp paper with the affidavit annexed, and left at the Secretary's lodge in the *Rolls-Yard*; 5s. 6d. is to be paid when it is taken away, the affidavit must be filed and the certificate thereof and petition annexed being left at the Register-office, the order will be drawn up, which must be passed and entred as before, and left at the *Subpœna*-office together with a *præcipe*.

A *subpœna* to appear and answer, returnable *immediate*, is never made out in term time, because it may be made returnable on any day certain in term; the immediate return supposes an urgent necessity for an appearance, which cannot be in term time where the time of appearance is every day; when there are many plaintiffs all of them need not be named, either in the *præcipe* or in the writ itself; but in such case say, at the suit of the first plaintiff and others, since that is sufficient notice to the defendant to appear; for the appearance to one plaintiff will be appearance to the rest; or if two plaintiffs say at the suit of the first plaintiff

plaintiff and another ; but all the defendants ought to be named ; only three defendants can be put into one writ, (husband and wife are reckoned but as one) except in *subpœnas* to testify, and any fault in the body or label (if served, or if the label and body do not agree) vitiates the writ, and the defendants may refuse to appear ; or if prosecuted for want of appearance, may refer the service for irregularity, and obtain costs, which the master of the *Subpœna*-office is liable to pay. A *subpœna* returnable immediate may be sued out against an officer of the court without the usual affidavit, because he is presumed always to attend. *Mof.* 42. — A *subpœna* may be made returnable and served on the same day it is sealed.

When the writ is sealed at a general seal, the costs of the writ are 5 s. but if it be at a private seal (which in cases of great importance may be necessary) 2 l. 10 s. 6 d. is paid for opening the seal, exclusive of the ordinary fees of the writ ; but no more than 3 s. 6 d. extra is paid for sealing any common writ when a private seal is obtained on any other occasion as for sealing a commission of bankruptcy, or the like.

Letter Missive.

THE writ of *subpœna* is not issued in the first instance against peers of the realm, or bishops, or peeresses of the realm : When a bill is filed against a peer or peeress of the realm, or a bishop, the first application is to the Lord Chancellor, Lord Keeper, or Lords Commissioners for the custody of the great seal by petition praying a letter missive, (*see tit. Petition*) in which the defendant is requested to order an appearance to be entered for him at a day therein mentioned. About the 16th of *Elizabeth* the practice was introduced of writing letters to the peers before the *subpœna* was issued, upon a presumption that a peer would pay obedience to the mere letter of the Chancellor. Or else it was founded upon a respect which

was thought due to the peerage engaged in public affairs that they should have notice before process issued. Especially because, having a numerous attendance, it might be inconvenient that they should incur a contempt from a process served in the common method by leaving it at their houses with one of their servants. This original letter, with a copy of the petition as answered, and an office copy of the bill signed by the six Clerk or his deputy, must be served upon the party personally, or by leaving them at his place of residence. But this letter missive * is only a compliment, it is not process to found proceedings upon, and the peer may appear or not as he pleases; if upon such service he appears it is well, if he makes default a *subpœna* is awarded against him, because no subsequent process can be formed but upon a contempt to the great seal, which is the royal authority, and the contempt will not arise from the Chancellor's letter which is *ex gratia*;) and if he fails to appear to that, an affidavit must be made of the service of the letter missive, petition, copy of the bill and *subpœna*, and a *sequestration* moved for against the defendant's real and personal estate (which the court grants of course) *unless the defendant, being personally served with the order, shall within eight days after such service shew unto the court good cause to the contrary*; and if after the defendant be served personally with this order, he persist in refusing to appear, then an affidavit of service must be made, and counsel instructed to move to make the order absolute; and when such order is drawn up, passed and entered, the plaintiff's clerk in court will make out the sequestration, the order being left with him, and this sequestration the court will not discharge till the party has appeared and paid the costs of the process; and then he may move to discharge the sequestration, upon

* This process gives the party suing it out priority of suit.
Bunb. 124.

notice to the adverse party if it be executed, which will be granted of course.

Personal service of the order *nisi* † in cases where a peer keeps within his own house, or is surrounded by his servants to avoid service, or the party serving the process is denied access, and it is very difficult and almost impossible to serve the order personally, may be dispensed with, in order to do which it is necessary to apply to the court to substitute a service by leaving, in lieu of personal service, grounding such application upon a proper affidavit of the particular circumstances of the case, upon which the court will exercise a discretion, and make the order, if the facts stated in the affidavit are strong enough to warrant such a proceeding.

To obtain a letter missive, a petition (*see tit. Petition*) ingrossed upon treble six-penny stamp paper, must be left at the Lord Chancellor's Secretary's, and if the prayer of the petition be granted, a letter missive must be bespoken at the same office; the fees for answering the petition and the letter missive amount to 1*l.* 6*s.* 7*d.*

The original letter with a copy of the petition as answered, and an office copy of the bill as before directed, must be served personally, or left at the defendant's place of residence.

The form of the Letter Missive is as follows :

My Lord,

9th August, 1782.

It appears by a petition (a copy whereof is herewith sent you) that *Charles Bunbury* Esquire, and *Sarah* his wife, have exhibited their bill in the high court of Chancery against your lordship and others, and desire your appearance thereunto on the 6th day of *November* next: wherefore I do at their request (according to the manner used

† All orders *nisi* require personal service, unless an order be obtained to the contrary.

to persons of your quality) desire your lordship to take knowledge thereof, and to give orders to those you employ in such matters for your appearance to the said bill accordingly.

I am

To the right honour-
able William Earl of
Abingdon.

Your lordship's humble servant,
Thurlow C.

By an order of 28th *November*, 1743, such persons are not obliged to pay for, or take out any other copy of bills upon their appearing thereto.—

Of the Service of this Writ.

IT must be served on or before the return-day. Service on the return-day is good, if before twelve o'clock at night: If there be three defendants you have two labels, one of which must be served on each defendant, and the body of the *subpœna* is to be shewed to the party at the time of service, and the body under seal left with the last of the defendants who is served. For if the body of writ should be left with the first defendant, and the two labels afterwards with the other two defendants, this is by no means a good service; because the affidavit of service (if required) must be that the party who was served with the label was shewed the body under seal at the time of the service; for unless the body under seal of the court appears, which is the ensign of the authority, no man need pay obedience to the mere written label. And it may not be improper for the party serving the writ to take a copy of the label, in order to make the affidavit of service. If there be two defendants, there is but one label, and the same method may be taken in serving one defendant with the label personally, and shewing him the writ under seal, and leaving the body of the writ at the other defendant's dwelling-house or place of residence, with one of the family. If there be but one defendant in the *subpœna*, the body of the writ may

be delivered to him, or left with one of the family at his dwelling-house or place of residence; the body of the *subpœna* not requiring personal service.

If the *subpœna* be against husband and wife, service on the husband is good service on him and his wife, and service on the wife is good service on the husband, if the body be left with her under seal at the husband's place of abode, because it is presumed to be sufficient notice to the other; but leaving a label with the wife has been doubted if good service on the husband.

Where one party has sued another at law, and such plaintiff cannot be found or heard of, or is beyond sea, the court on motion or petition, grounded on an affidavit of the fact, will order service of a *subpœna* on another of the parties, or on the Clerk in court, the Solicitor, or the Attorney, to be good service on the defendant, and the order and *subpœna* being served on the defendant's Clerk in court, Solicitor, or Attorney, and he or they refusing to appear, upon an affidavit thereof, the Clerk in court will make out an attachment, upon which an injunction must be moved for to stay proceedings at law.

Two defendants had brought a joint action at *Leghorn* against the plaintiff, and had there arrested his goods, and the defendant, *Baker*, being now here, and the other at *Leghorn*, and a bill being filed against them, *Baker* put in his answer. And it was ordered, that a *subpœna* being left with him should be good service on the other defendant who was at *Leghorn*: And thereupon an attachment for want of an answer, and so an injunction to stay proceedings at *Leghorn*. But the Lord Chancellor said he would advise with the Judges, which afterwards he said he had done; and their opinion was, that the injunction ought to be dissolved: But the reporter says, that all the bar was of another opinion; and that it was said, that an injunction did not lie for foreign jurisdictions, nor out of the King's dominions; but to that it was answered, that the injunction was not to the court, but to the party. 1 *Chan. Ca.* 67. *Love v. Baker.* 1 *Wms.*

Service

Service on an agent, formerly a partner, ordered to be good service on a defendant abroad. *Bunb.* 107.

The court, on motion, will order leaving a *subpœna* with the Turn-key of a prison to be good service on a prisoner at large: if the defendant be in close custody, such service is good without motion.

Where the husband only is served with a *subpœna* against him and his wife, tis good service upon both; and for want of an appearance for himself and his wife, an attachment may issue against him; but the wife cannot be sued without the husband, except where the husband is out of the kingdom, or other special case upon order obtained for that purpose. *Ca. Rep.* 92. *Toth.* 11. 13.

A *subpœna* returnable immediate was moved for against Mr. *Huggins*, the Keeper of the *Fleet-prison* (who had been committed to *Newgate* for murder, of which he was indicted and a special verdict found but not argued) and that service thereof on the Turnkey or Keeper of *Newgate* might be deemed good service, because his servant had denied access to him. Lord Chancellor King was of opinion that no process could be served on a prisoner committed at the suit of the Crown without leave; though if he once appears you may go on against him; but as his Lordship was one of the commissioners of *Oyer and Terminer*, before whom he was tried, he made an order that the Keeper of *Newgate* should admit a person into the prison to serve him. *Mof.* 237.

If upon a copy served, and the writ shewn, the person speaks with contempt before he knows the contents, or from what court it issued, it will be a contempt. *Mod. Caf.* 43.

If the contempt be by abusive actions, as beating or abusing the person who serves the process, the offender shall be on motion committed upon an affidavit thereof without examination, *Ord. Canc.* 116. So of contemptuous words, he shall be committed upon the affidavits of two persons without further examination: and a single affidavit in such case is sufficient to ground an attachment, upon which he shall be examined, and if the misdemeanor be

confessed or proved, be committed. And if he shall not be thereof found guilty, save by the oath of the party who made such affidavit, he shall be discharged, but without costs in respect of the oath made against him. *Ord. Canc.* 116.

Though contemptuous words were spoken of a *subpœna*, and the person serving it severely beaten, yet, as these facts were proved by the oath of a single witness only, the court would not in the first instance order him to stand committed, but made a rule upon him to *shew cause* why he should not stand committed. 3 *Atk.* 219.

A counterfeit *subpœna* does not oblige; and whosoever serves it, if he knows it, misbehaves himself; and an attachment will go against him.

Defendant made oath that he was served with a *subpœna* by the plaintiff in the name of one *William Webb*, utterly unknown to the defendant; and now, upon his appearance, no bill in court against the defendant in the name of the said *William Webb* or of the plaintiff, therefore 30*s.* costs are awarded against the plaintiff. *An. 19 Eliz. Cary* 92.

An attachment was awarded against the defendant for his non-appearance; upon oath he was served with a *subpœna*, who now appeared *gratis*, and would have excused himself that he had no notice of the *subpœna*; but he that served the *subpœna* deposed he did hang the same upon the defendant's door, and within half an hour after saw him abroad with a writ in his hand, which he supposed to be a *subpœna*; therefore he is committed to the *Fleet*. *Richer v. Stilman. Ca.* 57.

One of the defendants, a necessary party, having been a lodger in *London*, and not now to be found, the plaintiff obtained an order that service of process to appear and answer at his last place of abode should be deemed good service, and left the same at the house where he so lodged, and carried on the process to a sequestration, and then brought on the cause against *B.* the other defendant, who insisted, that if the plaintiff ought to be relieved against him, he ought to have a decree over against the other defendant, and therefore he was concerned to see the proceeding was regular,

regular, and insisted that it being above twelve months since the other defendant had left that lodging, the service was not good ; and the court was of that opinion. 2 *Vern.* 369. *Packer v. Blackborne.*

If the defendant be a member of the House of Commons, an office copy of the bill, signed by the proper Six clerk or his deputy, must accompany the writ, and may be served personally ; or, which is more convenient and most usual, by leaving the *subpæna* under seal, and copy of the bill, at the defendant's dwelling-house or place of residence, with one of the family.

By an order of 28th November, 1743, members of either house of parliament are not obliged to pay for or take out any other copy upon their appearing thereto.

If a bill be filed against a corporation, the process must be served upon some one of the members.

By stat. 5 *Geo.* 2. c. 25. Where persons have withdrawn themselves beyond the seas, or otherwise absconded, to avoid being served with process to appear ; if in any suit, instituted in any court of equity, any defendant against whom any *subpæna* or other process shall issue, shall not cause his appearance to be entered upon such process, within such time, and in such manner, as according to the rules of the court the same ought to have been entered, in case such process had been duly served, and an affidavit shall be made to the satisfaction of such court, that such defendant is beyond seas, or that, upon enquiry at his usual place of abode, he could not be found, so as to be served with such process, and there is just ground to believe such defendant is gone out of the realm, or otherwise absconds, to avoid being served, the court out of which such process issued may make an order, directing and appointing such defendant to appear at a certain day therein to be named, and a copy of such order shall within fourteen days after such order made be inserted in the *London Gazette*, and published on some Lord's day immediately after divine service, in the parish church of the parish where such

defendant made his usual abode, within thirty days next before such his absenting, and also a copy of such order shall within the time aforesaid be posted up in some public place at the *Royal Exchange* in *London*; and if the defendant doth not appear within the time limited by such order, and within such further time as the court shall appoint, then, on proof made of the publication of such order as aforesaid, the court, being satisfied of the truth thereof, may order the plaintiff's bill to be taken *pro confesso*, and make such decree thereupon as shall be thought just, and may thereupon issue process to compel the performance of such decree, either by an immediate sequestration of the real and personal estate and effects of the party so absconding, or such part thereof as may be sufficient to satisfy the demands of the plaintiff or plaintiffs, or by causing possession of estate or effects demanded by the bill to be delivered to the plaintiff, or otherwise, as the case may require, and may order such plaintiff to be paid his demand out of the estate and effects so sequestered according to the decree, such plaintiff first giving sufficient security, in such sum as the court shall think proper, to abide such order, touching the restitution of such estate or effects, as the court shall think proper to make concerning the same, upon the defendant's appearance to defend such suit, and paying such costs to the plaintiff as the court shall order, and plaintiff refusing or neglecting to give such security, the estate and effects so sequestered, or whereof possession shall be decreed to be delivered, to remain under the direction of the court until appearance of the defendant and payment of costs to the plaintiff. Provided that if any decree shall be made in pursuance of this act against any person being out of the realm or absconding as aforesaid at the time such decree is pronounced, and such person shall, within seven years after the making such decree, return, or be publicly visible, then he shall be served with a copy of such decree within a reasonable time after his return or publick appearance, and in case of defendant's death
within

within seven years after making such decree before his return or appearing openly, his heir or executor to be served with such copy. Provided that if any person so served with a copy of the decree shall not within six months appear and petition to have the cause reheard, such decree shall be absolutely confirmed against such person and all persons claiming under him. Provided that if any person so served with a copy of such decree shall within six months after service, or not being served, shall within seven years after making such decree appear in court and petition to be heard as to the matter of such decree and shall give security for costs, the person petitioning shall be admitted to answer the bill, and issue may be joined as if the party had originally appeared, and as if no proceedings had been had. Provided that if any person against whom such decree shall be made, his heirs, executors, or administrators, shall not within seven years after making such decree appear and petition to have the cause reheard, and give security for costs, such decree shall stand absolutely confirmed. And at the end of such seven years, the court may make such further order as shall be just and according to the circumstances of the case. This act not to extend to make good any proceedings against any person beyond the seas, unless it shall appear to the satisfaction of the court by affidavit before the making of such decree, that such person had been in *England* within two years next before the *subpoena* in such suit issued against such person.

It was the opinion of Lord *Hardwicke* upon the above statute, That it was not sufficient to make an affidavit that the party making it was informed and believed that the defendants withdrew themselves into *Ireland*, to avoid being served with the process of this court, but it must be set forth by whom the party deposing received such information. *Barnard. Chqn. 401.*

If the minister of the parish prevents an order pursuant to this statute being published, as the act is silent, nor mentions any penalty for his disobeying it—Lord *Hardwicke*

of opinion that the minister is indictable for contempt of the order of this court. 2 Atk. 114.

This statute seems to have omitted providing for the case of a defendant served with *subpœna*, and neglecting to enter his appearance and avoiding the process of contempt; plaintiff in such a predicament is left to the ordinary method of issuing process to a sequestration and holding the lands sequestered; for defendant must have appeared or been in custody before a decree *pro confesso* can be made against him, and the utmost length the court can go, is to grant an injunction grounded upon such sequestration.

Plaintiff served defendant with *subpœna ad respond.* at *Edinburgh out of the jurisdiction of the court*, defendant did not appear, and an attachment for the contempt was issued, upon which he was arrested in *London*, defendant moved that the attachment grounded on such service might be discharged for irregularity, and insisted a *subpœna* could not be served out of the jurisdiction. After two arguments, in which the case of *Vanbessen v. Slippenback* and others, 1749, was cited, where a *subpœna* was served in *Holland*, and under the particular circumstances of that case Lord *Hardwicke* held the service to be regular; Lord *Thurlow*, stating the opinion of the Master of the Rolls (Sir *Thomas Sewell*, Knt.) to be that the service was regular, ordered the motion to stand for further consideration, and no judgment was ever given. *Bourke v. Lord Macdonald*, *Michælnas* 1780.

Defendant residing at *St. Vincents* in *America*, mortgaged lands in *England* to plaintiff; upon the back of the mortgage deed a memorandum of agreement was indorsed, empowering and authorizing—*Turton* and—*Summerton*, two attornies, to receive a *subpœna* for him, and to enter an appearance in *Chancery*, that a sale or foreclosure of the estate might be decreed if the money was not paid at the day. *Turton* and *Summerton* were not parties to the deed. Plaintiff filed his bill to foreclose, and applied to *Turton* and *Summerton* to accept the *subpœna* and appear, which they refused to do; and now it was moved by Mr. *Ambler* “that
“ service

“ service of *subpœna* upon them might be good service.” Lord *Thurlow*, This is going beyond what the court hath hitherto done in ordinary cases; the court hath ordered service upon the attorney to be good service to ground injunction against proceedings at law, where the plaintiff below is out of the jurisdiction. There have been cases where party has empowered an attorney to accept the process, and the bill was against the attorney and principal, and the attorney, by his answer, admitted he had accepted the process pursuant to the authority delegated to him from the principal, and then he bound himself. In the present case there has been no such undertaking on the part of the attornies, and you want to make service on them good service, not having undertaken, but on the contrary peremptorily refused to act under the agreement. There is a difference between a man agreeing his attorney shall accept a *subpœna*, and the court taking up the thing and saying he shall accept the writ and appear. The attornies here are not bound to give him any notice, and he can have no remedy against them. Upon good consideration of the case, I do not think I can extend the jurisdiction so far, though the Master of the Rolls thinks otherwise. Take nothing by the motion. *Willings v. Loman. Hilary 1781.*

Bill by residuary legatee against defendant who was one of the executors, without making his co-executor party, objection at the hearing that his co-executor ought to have been party, and that although the court entertained bills where one factor only is made party without his companion beyond sea, yet that was *ex necessitate rei*. Lord *Somers* ordered the cause to proceed, and said the reason is the same in the principal case as in the case of joint-factors, and doubted whether a foreigner can be served with a *subpœna* in a foreign country. And *Hutchins* said he remembered that the Great Duke of *Tuscany* had laid several persons by the heels for executing a commission to examine witnesses in his dominions without his leave. *Preced. Chan. 83. Courlad v. Cily.*

Defendant

Defendant lived at *Epsom* above ten miles from *London*, and being a barrister he had chambers in the *Temple*, but had little or no business. A *subpœna* returnable *immediate* was moved for, upon an affidavit, stating that defendant's place of abode was at *Epsom*, but that he had chambers in the *Temple*, and resided there. Lord *Thurlow*, As it does not appear his *place of abode* is in the *Temple*, I cannot make any order. Take nothing by the motion. — *v. Shaw. Hil. 1781.*

Defendant, a member of the House of Commons, having a house at *Southampton* and no town residence, was served with a *subpœna* returnable *immediate* in *London* at a friend's house with whom he was upon a visit. For default of appearance a sequestration had been awarded, and a motion was made at the instance of defendant to set the process aside for irregularity; and for that purpose defendant having *no place of residence in town* otherwise than as above stated, was relied on, and *Bearcroft's* case in *Scac.* was cited. Lord *Thurlow* could not suppose defendant, a member of parliament, during the session of parliament had no town residence, or that the residence above stated should not be taken as a residence *quoad* defendant, whose duty it was to attend, and actually did attend the house.—That *Bearcroft's* case differed from the present case—the bill being for an account, if defendant wanted a longer time than usual to answer, upon application stating the circumstances he would be allowed it; and refused to grant the motion. *East-India Company v. Sir Thomas Rumbold. Hil. 1781.*

Defendant having a town residence and a country residence, a *subpœna* returnable *immediate* was served upon her, by leaving the body under seal, at her house in town, defendant at that time being at her house in the country (*Penshurst* in *Kent*) above ten miles from *London*; defendant appeared *gratis* as in a town cause, and obtained by petition the usual order in a country cause, *viz. a commission to take her answer, and six weeks time to return it.* Plaintiff moved to discharge this order for irregularity, and

and contended that defendant having appeared as in a town cause she had remedied all defects, and should be obliged to answer as in a town cause. Lord *Thurlow*, It is not conclusive evidence that it is a town cause if she appears as in a town cause, but rather as if she was desirous of expediting the cause, and here she has appeared *gratis*. Let the order stand as it does. *Sidney, Titular Earl of Leicester, v. Perry. Hil. 1782.*

A clerk in Chancery was committed by the Lord Keeper for a very high misdemeanor in sending writs into the country with *soft yellow wax* upon them, without being sealed by the Great Seal, as if they had been actually sealed, and this was said to be a misdemeanor next to counterfeiting the seal: and he was bound in 1000*l.* himself, and two more in 500 *l.* each, for his appearance in order for an information. 12 *Mod.* 355. *Thatcher's Case.*

* Where infants are parties, and the mother secretes them so as they cannot be served, a service upon the mother is sufficient, as she is the natural guardian. 2 *Atk.* 70. *Smith v. Marshall.*

Plaintiff made oath that he heard defendant confess he was served with a *subpœna*, and hath not appeared, therefore an attachment. *Ca.* 104. 115.

Upon oath that deponent did shew and offer to deliver to the defendant a *subpœna*, which he would not accept, and has not appeared, an attachment. *Ca.* 134.

Appearance.

THE defendant's appearance is either *voluntary* or *compulsory*; voluntary, where he comes in upon the return of the *subpœna ad respond.* and enters an appearance by a Clerk in court, or Solicitor; *compulsory*, when he is taken and brought in upon an attachment or other process.

A defendant is not bound to appear till the return of the process, though he be served with it ever so long before.

If a defendant within twenty miles of *London* be served with a *subpœna* to appear and answer on the return day, he hath four days after the return to appear in; if he be served within four days before the day of the return, he hath four days exclusive of the day of service; if served four days

or

or more before the return, he must appear on the return day.

If above twenty miles from *London* a defendant be served with a *subpæna* on the return day, or within eight days before the return, he hath in either case eight days from the day of service to appear. But if he be served eight days or more before the return, he must appear on the return day. *Ord. Canc.* 93.

If the *subpæna* be returnable *immediate*, defendant has four days, exclusive of the day of service, to appear. In default plaintiff may attach the fifth day.

When husband and wife are served with a *subpæna*, or if the husband be only served and hath notice that his wife is also a defendant, he must appear for both, otherwise an attachment may in the first case go against both, in the latter against him. *Prac. Reg.* 18.

Bill against husband and wife, the husband only appeared and put in a demurrer in their joint names for the non-appearance of the wife; attachment against both. *Ca.* 55. 92.

And in all cases, after due service, the process of contempt may be awarded against the husband for the default of the wife, unless an order be obtained to the contrary.

If a bill be brought against baron and feme for a demand out of the separate estate of the feme, and the husband is beyond sea, and not amenable by the process of the court, yet if the wife be served with a *subpæna*, she must appear and answer the plaintiff's bill. *Bell v. Commissary Hyde.* 2 *Vern.* 613. *Preced. in Chanc.* 328.

Bill against husband and wife, process of contempt issued against both, upon which the wife only was taken and gave bail-bond for her appearance, and appeared for herself only, and afterwards applied for and obtained time to answer separately. It was moved upon two points: First whether the taking her up on the attachment was regular? Secondly, if not, whether the irregularity was waived by her appearance? *Lord Hardwicke,*

The question now is, Whether it is consistent with law and the course of this court, after she has appeared and prayed time to answer separately, and had an order for it, to discharge her from these acts of her own? I think not; I never before heard of the doctrine that a party after appearance might complain of the irregularity of the service in a *sub-pœna*; for if the label only be left with a servant of the family, after appearance, the court will not set it aside, the irregularity being waived; but this case is stronger, being the same as after imparlances at common law; and it is an admission on her part that there is something separate from her husband to which the wife is to answer. It is said the appearance of the wife is absolutely void in point of law, and therefore every thing built on it falls to the ground, because the wife can in no case appear without the husband. I deny it, both in the proceedings in this court and at law. *Master of the Rolls* concurred in opinion that defendant was precluded from taking this objection now; after any act shewing an acquiescence and defence of the cause, it is too late to set it aside; and here is not only an appearance, but an application for time. 1 *Ves.* 383. *Travers v. Buckley.*

The usual method of a defendant's appearing is (either by himself or his Solicitor) to employ or retain a Clerk in court or waiting Clerk to appear for him, and recourse is to be had to the general bill-book, to see who filed the bill; which if actually filed, the defendant's Clerk in court leaves with the plaintiff's Clerk in court a note in writing, informing him of defendant's appearance, after which he searches the Six-clerk's study who filed the bill, and then takes it from the file, at the same time leaving a note with the Six-clerk and entering it in his book there; but if a Clerk in court hath already appeared for any other defendant to the bill, the plaintiff's Clerk in court is applied to to know what Clerk in court appeared for the other defendant or defendants, and an application made to that Clerk, and of him the bill is received and an office copy made therefrom; if the Clerk in court searches and finds the bill not entered,
or

or not filed, he inserts the following note in the book for that purpose :

John Stradling }
v. } Enter bill.
Jeffrey Stiles }

But if he has preferred costs he then adds after the words "*Enter bill, costs preferred*" and leaves a note thereof with his Six-clerk, the Clerk in court usually makes out the bill of costs, and carries it before a Master, who taxes it in a summary way and sets his name to the bill ; in a town cause, he usually taxes it at *one pound six shillings and eight pence*, in a country cause at *one pound thirteen shillings and four pence* ; and that bill is carried to the Register to be entred, for which one shilling and four pence is paid ; afterwards a *præcipe* must be left at the *Subpæna*-office for a *subpæna* for costs, which is obtained in the same manner as a *subpæna* to appear and answer, and the costs are always made payable to defendant or bearer : This *subpæna* requires personal service, and the costs must be demanded, if defendant refuse to pay them, an affidavit of such service, demand and refusal, must be left with defendant's Clerk in court, and he will make out an attachment against plaintiff ; and the plaintiff will not be permitted to file his bill until he has paid the costs ; but he may move to retain his bill upon payment of costs out of purse.

The *stat. of Ann.* permits a *subpæna* to issue before the bill is filed, where an injunction is prayed, or to stay proceedings at law ; in such cases the bill need not be filed before the day on which the *subpæna* is returnable, and defendant cannot prefer costs until the day next after the return ; if Clerk in court for defendant to any other bill searches the office before the *subpæna* is returnable, and no bill be filed, he may take the necessary steps to prevent the bill being antedated, and at the return day prefer costs. The bill not being filed on the return day, defendant need not appear, and plaintiff cannot attach, but must serve defendant with process *de novo*.

By

By *stat. 5 Geo. 2. c. 25. f. 2.* If any defendant or defendants, by virtue of any writ of *habeas corpus*, or other process issuing out of any court of equity, shall be brought into court, and shall neglect or refuse to enter his, her, or their appearance, according to the rules or method of such court, or appoint a clerk in court, to act on his, her, or their behalf respectively, such court may appoint a clerk in court, or attorney, to enter an appearance for such defendant or defendants respectively; and such proceedings may thereupon be had in a cause, as if the party had actually appeared. — *Seet. 3.* Persons in custody so refusing to appear, are to be served with a copy of the decree, before any process can be taken out to compel the performance thereof.

An order had been obtained by contrivance under the *stat. of 5 Geo. 2.* the defendant appeared to the bill; the court, on application, set aside the order; for though an appearance, where it is *only irregular*, salves error in process, yet where the order which occasioned the appearance had been obtained by male-practice, the appearance will not salve a defect of that sort. — The Solicitor was committed for obtaining this order in an undue manner. *Barnard. 402.*

A member of the House of Commons regularly served with an office copy of the bill signed together with a *sub-pœna*, and refusing or neglecting to appear, must be proceeded against by sequestration: upon an affidavit of service a sequestration must be moved for against the defendant's real and personal estate (which the court will grant of course) unless the defendant, being personally * served with such order, shall within eight days after such service shew good cause to the contrary; and if after personal service of this order *nisi* the defendant persists in his contempt, the order for a sequestration will be made ab-

* All orders *nisi* require personal service, unless an order be made to the contrary.

folute upon motion; grounded upon an affidavit of the service of the order *nisi*; and the Clerk in court having the order left at his seat will make out the sequestration, which the court will in no wise discharge until the contempt be cleared and costs paid, upon performance of which the sequestration will be discharged by the adverse Clerk or Solicitor, or in default by application to the court.

The personal service of the order *nisi* for a sequestration may be dispensed with, if defendant keep within his house or cannot be served personally; by application to the court grounded upon an affidavit stating the fact, which if deemed satisfactory, service by leaving the order *nisi* will be substituted instead of personal service.

Where a bill is brought against an infant, he must (if in town) appear in court, and have a guardian assigned him, by whom he may defend the suit; if the infant reside in the country, he sues out a commission to assign a guardian. Where the infant neglects to appear, on affidavit of service, an attachment against the infant is awarded (though never executed), and it is a motion of course to move upon the attachment for an order for a messenger to bring the infant into court, and being brought into court, if no person offer on his behalf to be assigned his guardian, the court usually orders the senior Six-clerk not towards the cause to be assigned his guardian, to appear and defend the suit. This order must be drawn up, passed and entered at the Register-office, and given to the messenger of the court, who thereupon procures the following warrant:

“ WHEREAS by an order bearing date the 24th day
 “ of April instant, made in a cause between *Judith Coke*,
 “ widow, plaintiff, *John Brookes* by bill of revivor, defend-
 “ ant. It is ordered, that the messenger attending this
 “ court do take the said defendant *John Brookes* an infant
 “ into custody, and bring him into this court to have a
 “ guardian assigned him, by whom he may answer the
 “ plaintiff’s bill and defend this suit. These are there-
 “ fore, in pursuance of the said order, to will and require
 “ you forthwith, upon receipt hereof, to make diligent
 search

“ search and inquiry after the said defendant *John Brookes*
 “ an infant, and, wheresoever you shall find him, to arrest
 “ and apprehend him, and bring him into this court, to
 “ have a guardian assigned him as aforesaid, willing and
 “ requiring all and singular mayors, sheriffs, justices
 “ of the peace, bailiffs, constables, headboroughs, and all
 “ others his Majesty’s officers and loving subjects, to be
 “ aiding and assisting to you in the due execution of the
 “ premises, as they tender his Majesty’s service, and will
 “ answer the contrary at their perils. And this shall be your
 “ warrant. Dated this twenty-eighth day of *April*, in the
 “ seventeenth year of the reign of our Sovereign Lord
 “ *George* the Second, by the Grace of God, of *Great Bri-*
 “ *tain, France, and Ireland*, King defender of the faith, &c.
 “ and in the year of our Lord, one thousand seven hun-
 “ dred and forty-four.

Hardwicke C.

To *John Crawford* Esq. his Majesty’s
 messenger attending the High Court
 of Chancery, or his deputy.

I do appoint Mr. *Michael Heath* my deputy, to exe-
 cute this warrant. Witness my hand this twenty-
 eighth day of *April*, 1744.

John Crawford.

Upon this warrant the messenger brings the infant into
 court, and the court being apprized thereof by counsel,
 assigns the senior Six-clerk, not towards the cause, if no
 friend or relation will undertake the guardianship.

Of Process to enforce Appearance.

WHEN the party has been regularly served with
 the *subpœna*, and neglects or refuses to appear, he
 is said to have incurred a contempt of court, and unless
 he be privileged, the *ordinary process* to enforce obedience

to the rules and orders or decrees of the court, by parties to the *suit* standing out in contempt, is awarded against him; the first proceeding is an

Attachment.

AN attachment is a writ issuing out of this court under the Great Seal, directed to the Sheriff, or other ministerial officer, commanding him to attach a party for a contempt, in disobeying the rules and orders, or non-performance of a duty enjoined by the court. An attachment differs from a *capias* at law in this, upon a *cepi corpus* returned to a *capias* the Sheriff is amerced if he does not bring in the body, pursuant to the *stat. Westm. 2. c. 29.* And from the tenor of the attachment it seems as if the Sheriff may be amerced for not bringing in the body: but because the writ was originally founded upon a contempt, when the Sheriff has taken up the party he has paid obedience to the writ, though he does not actually bring him up to the court; because the contempt only induces a commitment, which is satisfied by imprisonment in the county gaol. And the *stat. of Westm. 2.* only relates to original and judicial writs, and not to these prerogative processes.

An attachment lies for any contempt, as for not appearing, not answering, or answering insufficiently, &c.

An attachment after a decree for dismissal, is in nature of an execution at common law, and a general pardon may pardon the contempt, but not the debt. *Finch. 253.*

This writ must be made returnable in term, and there must be fifteen days between the *teste* and return in proceeding to a sequestration, or to take a bill *pro confesso*, unless defendant live within ten miles of *London*, and then an order may be obtained by motion or petition, to make the several processes returnable *immediate*.

Upon an attachment there are two returns, *non est inventus* (upon which the attachment with proclamations is grounded) or *cepi corpus*; if *cepi corpus* be returned, a messenger

ger must be moved for to bring up the defendant, if he will not answer below; for the Sheriff has executed the command of the writ, by taking the body, and he cannot carry the defendant out of the county; if he did, he would be liable to an action for an escape; but when defendant is in custody, and there are other detainers against him, then a *habeas corpus cum causis* must be moved for, upon which he is brought up, and turned over to the *Fleet prison*; and it is now the constant practice in all cases* (unless defendant has other detainers against him, whether the fines and amercements are granted to the cities and towns corporate to whose officer the writ is directed or not) upon a *cepi corpus* returned to move for a messenger producing the writ and return to the court, which is granted of course; and this messenger being the immediate officer of the court, takes the defendant by virtue of the order, without making the sheriff liable to an escape, because he is removed by order of the court, and in possession of the court by its messenger.

Upon motion for a messenger upon a *cepi corpus*, the defendant living in *London*, Lord Keeper said, this had been looked upon as a motion of course; but in truth it was founded upon a mistake; for, to his Lordship's knowledge, the officers of the city have not their own amercements; they have no royal amercements. 1 *Vern.* 116. *Anon.*

Upon a motion for a messenger upon a *cepi corpus* returned in *London*, the Lord Keeper said, that now the granting of a messenger in such a case was become the ordinary process of the court, and it might be necessary for expedition; but he must take care that the King might not lose his amercements; and therefore for the future no messenger should go, till the Sheriff was amerced: but it was answered, that would occasion great delay, for that the Sheriff could not be amerced but in term time. 1 *Vern.* 154. *Anon.*

When a *cepi corpus* is once returned, there is an end of all manner of process (for no proclamation or commission of rebellion goes after that), and though a messenger of late years has been usually granted in such cases, yet he is but a new officer, and subordinate to the Serjeant at Arms; but

* 2 *Atk.* 507.

Attachment.

regularly in such case you ought to move, that the defendant may enter his appearance, and be examined in four days, or stand committed. 1 *Vern.* 344.

On a motion and suggestion, that the Sheriffs of *London* have the amercements, and therefore it being a vain thing to amerce, the usual way in such cases is for a messenger. *Lord Chan. King* said, that if he had this body in his custody, the best way is to move that he may bring in the body, which, if not done forthwith, he said, he would order the Sheriff to pay the plaintiff all his costs; and that by introducing this practice into the *Common Pleas*, he had prevented this dilatory there; and therefore, in order to prevent the like delay in this court, his Lordship directed an order upon the Sheriff, that he forthwith bring in the body. 2 *Wms.* 301. *Anon.*

The party who served the *subpoena*, having made an affidavit positive and certain of the time, place, and manner of service (see tit. *Affidavit*), after the return, if the party, do not appear within the time limited by the rules of the court, he has incurred a contempt; and to enforce obedience, the Solicitor must apply to the clerk in court, and bespeak an attachment, leaving the affidavit of service at the same time, which the clerk in court will take care to file, before the return of the attachment, and the writ being made out, is left with the Bag-bearer of the Six-clerks Office, to be sealed. The form of the writ is :

Form of
Attachment. " GEORGE the Third, by the Grace of GOD, of
Great Britain, France, and Ireland, King, Defender of
the Faith, and so forth. To the sheriff of ———, greet-
ing. We command you to attach ———, so as to have
him before us in our court of *Chancery*, wheresoever the
said court shall then be, there to answer to us as well
touching a contempt which he, as it is alledged, hath
committed against us, as also such other matters as shall
be then and there laid to his charge; and further to per-
form and abide such order as our said court shall make in
this behalf: And hereof fail not, and bring this writ with
you.

Attachment.

103

“ you. Witness ourself at *Westminster*, the ——— day of
 “ ———, in the ——— year of our reign.

“ *Sewell Reynardson.*”

The Label.

“ *To the Sheriff of ———, an attachment against ———, for*
 “ *not appearing at the suit of ———, returnable in eight*
 “ *days after the Purification next ensuing. ———*”

To the bottom of this writ, on the right hand side, put the surname of the Master of the Rolls, and the Six-clerk, in whose division the writ is made out: indorse the writ
 “ By the court, for not appearing, or answering at the suit of ——— plaintiff. About the middle of the writ, on the back, put the surname of the Clerk in court who makes out the writ. The Clerk in court then makes an entry in his writ-book, and also a note to enter with the Register, which corresponds with the entry in his writ-book, and is in this form :

To the Sheriff of ———: An attachment against ———, for not appearing at the suit of ———, returnable in eight days after the Purification next ensuing.

Lee, clerk.

Dated 19th January, 1783.

To this the sworn clerk's name who enters it is subscribed, and the day it is tested, as above, and then it is to be left with one of the entering registers, to whom *1 s. 2 d.* is to be paid ; and the Register marks the entry in the sworn clerk's writ-book.

Attachments for costs are of the above form, only the writ is indorsed “ By the court for non-payment of costs, “ (naming the sum) at the suit of ———.” And the sum therein specified payable to *A. B.* or bearer, and not bailable.

Where a man is arrested upon an attachment, the contempt holds good though no affidavit be filed at the time of taking forth the attachment, if it be filed before the return. *1 Vern. 172. Anon.*

All process to be issued upon any contempts, is to be made out into the proper county where the party against whom the same process issueth shall be resident or dwelling, unless he shall be then in or about *London*; in which case it may be directed into the county where he shall then be, that it may be served upon him there, and that every suitor who prosecuteth process of contempt against any of his Majesty's subjects, shall do his best endeavour to procure the said process to be duly executed, and the supposed contemnors to be apprehended thereby; and if any shall be arrested upon a proclamation, or commission of rebellion, or by the Sergeant at Arms, and shall make it appear unto the court by proof, that the prosecutor of those processes hath not done his best endeavours to have had the first and precedent process duly executed, as by the order is required; then the party so offending shall pay unto the party aggrieved very good costs for his wrongful vexation, contrary to the direction of this order. *Ord. Canc. 11. 7 Car. 1631.*

The Register of the court shall not enter in his office any common rule or attachment which issues from the Six-clerks Office, but by a note or warrant under the Six-clerk's own hand that is attorney in the cause, or his deputy; and the Six-clerks are carefully to see that all common rules and attachments be duly entered in the house-book, and with the register, according to the ancient course of the court; and no under clerk in the office shall enter any rule in the house-book or the register, until the same be first entered with the Six-clerk, to whom the said rule is proper to be given. *Ord. Canc. 45. 2 Car. 1646.*

No clerk of this court shall issue any attachment for not appearing, but upon affidavit positive and certain of the day and place of such service of the *subpoena*, and the time of the return thereof, whereby it shall appear that such service was made in *London*, or within twenty miles thereof, four days at the least, excluding the day of such service; and if above twenty miles, then to have been eight days before such attachment entered; and that such attachment shall not be discharged, but upon payment of usual costs, and so the succeeding

succeeding costs to be doubled. *Ord. Canc. 94. per Lord Clarendon and Sir H. Grimston.*

All process of contempt shall be made out into the county where the party prosecuted is resident, unless he shall be then in or about *London*; in which case, it may be made in the county where the party then is; and if any person shall be taken upon process otherwise, or irregularly issued, the party so taken first appearing unto, and satisfying the process which did regularly issue against him, shall be discharged of his contempt, and have his full costs, to be taxed of course by the * Six-clerk, not towards the cause, for such undue or irregular prosecution, from the time that the error first grew, without motion or other order. *Ord. Canc. 112.*

Every suitor who prosecuteth a contempt, shall do his best endeavour to procure each several process to be duly served and executed upon the party prosecuted; and his wilful default therein appearing to the court, such person offending shall pay unto the party aggrieved good costs, and lose the benefit of the process returned without such endeavour. *Ibid.*

All attachments in process shall be discharged, upon the defendant's payment, or tender to the plaintiff's clerk and refusal, of the ordinary costs of the court, and filing his plea, answer or demurrer (as the case regularly requires); but yet upon motion in court, or petition in that behalf. *Ibid.*

And if after such conformity and payment of costs (or tender and refusal thereof) any farther prosecution shall be had of the said contempt, the party prosecuted shall be discharged with costs. *Ibid.*

No process of contempt shall be made forth, and sent to the Great Seal, at the suit of any person prosecuting as plaintiff *in forma pauperis*, until it be signed by the Six-clerk, who deals for him, and the Six-clerks are to take care that such process be not taken out needlessly, or for vexation, but upon just or good grounds; as they will answer it to the court, if the contrary shall appear. *Ord. Canc. 125.*

* By the Master at present.

If after an arrest upon an attachment, and a *cepi corpus* returned, the defendant escapes out of the kingdom, a Serjeant at Arms shall be granted, and upon return a sequestration. 1 *Vern.* 344.

An attachment for non-performance of an order against one in the *Fleet*, is directed to the Warden of the *Fleet*; and on his return that he is a prisoner, you may move for a sequestration. *Mes.* 301.

The Sheriff cannot take bail on an attachment for not paying costs; but a messenger goes to bring in the party. *Preced. in Chan.* 331. *Gilb.* 85.

A Solicitor must serve his client with the order for taxing his bill of costs, and the Master's report, whereby such costs are ascertained, before he can take out an attachment for them. *Barn.* 226.

When you make out an attachment returnable three or four days after the *teste*, if you arrest the party, it is good; but if you let the return expire, and nothing is done upon it, and then make out another attachment, here you will be allowed in costs but for one writ, in case the party is taken upon the second; for there must be fifteen days between the *teste* and return of each process where the plaintiff intends to sequester defendant's effects; and if, in proceeding thereto, the defendant be taken, he must pay obedience to the rules and orders, or perform the duty decreed by the court, and pay costs of the process, before he can be discharged. When the party is taken upon an attachment, he must pay costs, which are 13s. 6d. and enter into a bail-bond, with two sureties in 20l. each, to the plaintiff, to appear and answer, as the case is, at the return of the writ, where the contempt is of a bailable nature. If the writ be not executed, the costs are 11s.

In all cases where the Sheriff does not make his return of the writ, if directed to him, this court, upon motion, will make an order upon him, to return the writ at a day certain; and upon affidavit of service, and his refusal or neglect so to do, will amerce him; which amercement is generally 5l. and

is to be estreated into the Exchequer, or order him to stand committed to the *Fleet* prison.

An attachment issued against a person out of this court, and the Sheriff had the body in custody, and took a bail-bond for his appearance, which he delivered to the plaintiff, who moved at a former seal, that the Sheriff might bring in the body; and the court made a rule upon him to shew cause, why he did not bring in the body. The council for the Sheriff shewed for cause, that he had delivered over the bail-bond to the plaintiff, and had not the custody of the body now. Lord *Hardwicke* allowed the cause shewn by the Sheriff, and discharged the rule; for the plaintiff is not without remedy, as he may have a messenger into the county where the person lives, which is now a motion of course upon a *cepi corpus* returned, though formerly the court allowed messengers to those particular jurisdictions, only where the Sheriffs had the amercements themselves; but the rule now is, to send a messenger into every county generally, without any restriction. 2 *Atk.* 507.

In attachments, and all other writs, regard must be had to the jurisdiction and privileges of certain places; which see at the end of this volume.

The form of this writ being “to answer to us, as well touching a contempt, which he, as it is alledged, hath committed against us; as also, such other matters as shall be then and there laid to his charge, and farther, to perform and abide such order as our said court shall make in this behalf,” he must answer as well as clear his contempt at the same time. If defendant be in contempt for not answering, and then puts in an insufficient answer, and the Clerk in court accepts the costs of the contempt, it purges the contempt; and in the process for the second answer, the plaintiff must begin *de novo*; but if the costs be not accepted, although tendered, and the first answer be reported insufficient, the plaintiff may take up the process where he left off. Therefore it is usual to refuse the costs for want of the first answer, until the Clerk
in

in court has seen whether it be a full answer, and then not to receive the answer without the costs. 2 *Wms.* 481.

Where the first answer is reported insufficient, and the party taken on process for not putting in a further answer, and he afterwards puts in a further answer, and pays the costs of the contempt (for until then it is no answer), the course is that he must be discharged; and if the answer is afterwards reported insufficient, you may carry on the process of contempt at the process you left off; he should not lie in custody until the Master reports whether the answer was sufficient, or not; which may be reported either way, and that after a long time. In case of an insufficient further answer, you are to take up your process of contempt just where you left off; which would not be so, if he was to lie in custody during that time. 2 *Ves.* 110. *Child v. Brabson.*

If the contempt be pardoned, the defendant may appear and proceed as if there had been no process. *Chan. Ca.* 238.

And the attachment may be superseded. Or if it be irregularly obtained, it may be discharged upon motion.

The defendant is adjudged to pay to the plaintiff forty shillings costs, for suing out process of contempt against him, being discharged by her Majesty's general pardon. *Jones v. Jones*, 18 & 19 *Eliz. Ca.* 79. *Fulwood v. Fulwood*, *Toth.* 48.

The Warden of the *Fleet* attends this court, and the court of Exchequer, by two deputies, and therefore *no attachment* will lie against him, because he is supposed to be always personally in court; a sequestration *nisi*, for not putting in his answer was moved for against the Warden. *Per cur.* It is common to suspend clerks of courts, and the wardens of the *Fleet*; take the order for a sequestration, which is a kind of suspension, *nisi*. *Mof.* 238.

An attachment for non-appearance was taken out before the bill was entered in the bill-book, though filed in the Six-clerk's office. Lord Chancellor seemed to think an entry

entry in the bill-book necessary to give the party notice ; for private notice to his attorney is not sufficient : but being doubtful of the course of the court, he referred it to a master. 1 *Ves.* 53. *Anon.*

By *stat.* 1 *Ann.* c. 8. s. 5. it is enacted, That no proceedings in any court of equity shall be determined, abated, or discontinued, by the demise of any King or Queen of this realm.

Habeas Corpus.

THE extraordinary jurisdiction of the court of Chancery enforcing obedience to its rules, orders, and decrees by prerogative process, which in the first instance is *in personam* (unless the defendant be privileged or proceeded against as absconding, pursuant to the *stat.* 5 *Geo.* 2. c. 25.) the writ of *habeas corpus* will be here considered as auxiliary to, and forming part of the process *in personam*, against parties incurring contempt of the rules and orders of practice, by not appearing, not answering, or not complying with interlocutory orders, or performing a duty enjoined by an absolute decree of the court.

The writ of *habeas corpus* in all other cases is granted by the court in its *ordinary* capacity, and the whole proceedings are on the law side.

The writ of *habeas corpus* in process, is a writ issuing out of this court under seal, directed to the Warden of the *Fleet*, Sheriff, or Keeper of the prison in whose custody the party is, commanding the person to whom it is directed to bring into the court of Chancery, the body of the defendant on the return thereof, to abide such order as shall then be made. The object of the writ is the removal of the defendant into the custody of the court, and to give the party an opportunity of shewing cause why he does not appear, or answer, and in order to his clearing his contempt, that he may be discharged, or such order be made touching the matter, as the court shall see cause ; and also to expedite and facilitate the proceedings in obtaining

obtaining a decree *pro confesso*; which decree is never made without abundant caution; and for this purpose, and to render this writ necessary, the party must be in custody, either by having been brought up in custody of a messenger, grounded upon a *cepi corpus* returned by the proper officer to an attachment or other process, and committed to the *Fleet*, which is the prison of the court (unless defendant be there when the attachment issued) or already in custody in a county prison, and detained for other causes in which case a *habeas corpus cum causis* must be obtained in order to bring defendant to the bar of the court, and to turn him over to the *Fleet* prison. When defendant is brought up by *habeas corpus cum causis* from a county prison, and ordered to be turned over to the *Fleet* prison, or in confinement there at the time of issuing the first process of contempt; in order to obtain a decree *pro confesso*, it is necessary to bring defendant into court; and this is done by producing the certificate of the Warden of the *Fleet* prison, if he be there, and moving for an order grounded upon such certificate, for a writ of *habeas corpus* to be directed to the Warden of the *Fleet*, commanding him, at the return thereof, to bring the body of the defendant to the bar of the court, to answer his contempt, and for further order. The court; when he is brought up, admonishes him of the consequences of his contempt, and interrogates him as to the causes of his refusal, and usually assign him a day to appear or answer (as it may be) and remand him to the *Fleet* upon motion, and if he stands out in contempt, an *alias habeas corpus* by order as before must be issued, and at the return thereof defendant being brought into court, and requested to pay obedience to the rules and orders of the court, if he persist in his contempt, upon motion he will be remanded to the *Fleet* prison until he clear his contempt, and further order and a *pluries habeas corpus* must be awarded by order as above, and defendant being brought again into court, and obstinately continuing in contempt,

tempt, the court will, upon motion, remand him, and order an *alias pluries habeas corpus* to be awarded, and that the Clerk in court do attend with the record of the plaintiff's bill, that the same may be decreed to be taken *pro confesso*. The defendant at the return of the *alias pluries habeas corpus* being brought to the bar, the court will proceed as before, and if defendant obstinately stand out in contempt, an appearance will be ordered to be entered for him, pursuant to the *stat. 5 Geo. 2. c. 25.* and the Clerk in court attending with the record of the plaintiff's bill, the matter thereof will be decreed to be taken *pro confesso* against the defendant; or if the contempt be for not answering, the court will make a similar order for taking the matter of the bill *pro confesso*, and remand the party until he performs the decree of the court. *Vid. tit. Decree pro confesso.*

If defendant be brought up from a county prison by *habeas corpus cum causis*, which is the only method of removing him, if there be other detainers against him, every subsequent writ of *habeas corpus* to the Warden of the Fleet to bring defendant to the bar of the court must be *cum causis*.

To obtain this writ it is necessary to apply by motion or petition, generally by motion, for an order for a writ of *habeas corpus* to be directed to the officer in whose custody defendant is confined, commanding him at the return thereof to bring the defendant to the bar of the court, and this is granted of course, producing the attachment or other process, with a *cepi corpus* returned thereon; and this order being drawn up, passed and entered, must be left with the Clerk in court, who will thereupon make out the writ.

The return is always on a day certain in or out of term: there is no limited time between the *teste* and return, nor between the issuing one writ and the return of another; but as a separate order must be had for each writ, it seems as if the former writ should be returned, and

and upon the day of the return, if it be necessary, to move for an order for an *alias &c.* for which reason it is most convenient to make the return in term time, or on a feal-day. Each order must be left with the Clerk in court, when the writ is bespoken. The form of the writ is as follows :

“ *GEORGE* the Third, by the grace of GOD, of great
 “ *Britain, France, and Ireland*, King, defender of the faith,
 “ and so forth, to the Warden of our prison of the *Fleet* or
 “ his deputy there, greeting. We command you that you
 “ do on the day of bring before us
 “ into our court of Chancery wheresoever it shall then be,
 “ the body of by whatsoever name
 “ or addition of names he is called or known, who is
 “ detained in our said prison in your custody (*together with*
 “ *an account of the cause or causes of his being taken into and*
 “ *detained in custody*) to perform and abide such and as
 “ our court shall make in this behalf; and hereof fail not,
 “ and bring this writ with you. Witness Ourself at *West-*
 “ *minster* the day of in the year
 “ of our reign

Indorsed, pursuant to Stat. 31 Car. 2.

By the Lord high Chancellor of Great Britain

T. C.

A writ of habeas corpus against C. D. at the suit of
G. M.

Label.

To the Warden of our prison of the Fleet, or his deputy
there; a writ of habeas corpus against C. D. return-
able ——— at the suit of G. M. (or at the instance
of defendant.)

In a *habeas corpus cum causis* the words in italics are inserted.

The prisoner being brought up from the county goal, together with the causes of his commitment, by virtue of the *habeas corpus cum causis*, the court orders him to be turned over to the *Fleet* prison, where he will remain charged as well with the detainers lodged against him below, as also until he perform the decree or order of the court.

This writ is left open, and the order annexed to it, and left with the Bag-bearer of the Six-clerk's Office, who procures the signature of the Lord Chancellor to it, and after it is sealed, leaves it at the Clerk's seat; the costs are fourteen shillings and two-pence. An *alias habeas corpus* pursues the form of the beforementioned writ, adding after the words "We command you" *as before we have commanded you*—a *pluries habeas corpus* "*as often times we have commanded you*" an *alias pluries habeas corpus* "*As before we have often-times commanded you.*"

The service is by delivering the writ itself under seal to the warden, keeper, or person in whose custody the defendant is, and keeping a copy of the label, and if he obey it not, the court will punish him in a summary way upon motion.

A prisoner in a gaol in the country, being in contempt for not performing a decree, may be brought up by this writ and turned over to the *Fleet*, whence he is not to go till he has obeyed the decree of this court. 2. *Ch. Rep.* 151 192. A defendant may remove himself to the *Fleet* by this writ.

Attachment with Proclamations.

THE writ of attachment with proclamations is a process issuing out of and under the seal of the court, upon a contempt after a *non est inventus* returned to an attachment; commanding the party to appear in Chancery *sub poena ligianciæ* to answer the contempt as well as the matters objected. *West. Symb.* 22. Where *non est inventus* is returned on a *capias* issued in criminal matters the party is proclaimed, and if he does not come in on such proclamation, he is declared an outlaw. So if he contemned the extraordinary jurisdiction, of the Chancery, he was proclaimed; and if he was not taken, or did not come in upon such proclamation then he was deemed a rebel, and a commission of rebellion issued, which is the next process.

To obtain this writ, the attachment with a return of *non est inventus* indorsed thereon, must be left with the clerk in

court, who will thereupon make out the writ, and leave it with the Bag-bearer of the Six-clerk's office to be sealed. The form of the writ is as follows,—

“ *GEORGE* the third, by the grace of *G O D*, of *Great Britain, France, and Ireland*, King, defender of the faith, and so forth, To the Sheriff of _____ greeting. We command you on our behalf, to cause public proclamation to be made in all places within your bailiwick as well within liberties as without, wheresoever you shall think it most convenient, that *A. B.* do upon his allegiance on (*here insert the return*) personally appear before us in our court of Chancery wheresoever it shall then be, and nevertheless, in the mean time, if you can find the said *A. B.* to attach him so as to have him before us in our said court at the time beforementioned, there to answer to us as well touching a contempt which he hath, as it is alledged, committed against us, as touching those things which shall be then and there laid to his charge, and further to perform and abide such order as our said court shall make in this behalf. And hereof fail not, and bring this writ with you. Witness Ourself at *Westminster*, the _____ day of _____ in the _____ year of our reign

Sewell, Reynardson.”

Indorsed, by the court, for not appearing (or not answering) &c.— and about the middle put the surname of the Clerk in court who makes out the writ.

The Label.

To the Sheriff of _____ an attachment with proclamations against *A. B.* for not appearing (or answering, as the fact is) at the suit of _____ returnable in fifteen days after Easter next ensuing.

Sewell, Reynardson.

To this writ subscribe the surname of the Master of the Rolls and the Six-clerk in whose division the writ is made out.

out (as before). It must then be entered with the Register in the same manner as an attachment, and when it is sealed the Bag-bearer leaves it at the Clerk in court's seat, and, he sends it to the Solicitor, to be sent to the Sheriff or other officer to whom it is directed.

There must be fifteen days between the *teste* and return if a sequestration be intended; unless an order be obtained to make the several processes returnable immediate, when defendant resides within ten miles of *London*.

After a contempt duly prosecuted to an attachment, with proclamations returned, no commission to answer shall be made out, nor any plea or demurrer admitted, but upon motion in court, and affidavit made of the party's inability to travel, or other good matter to satisfy the court touching that delay. *Ord. Canc. 99.*

The reason why upon the first contempt on the first attachment, a commission is allowed to issue, or a plea or demurrer to be put in, is, because it does not appear to be an affected delay, and therefore upon tendering the costs of the attachment the defendant may take his commission, and upon like tender, the plea and demurrer are to be received; but if there regularly issue an attachment with proclamations, the defendant cannot of course purge his contempt by a meer tender, but he must apply to the court, to shew that his plea or demurrer are proper, and to exhibit a proper excuse for his delay, that the court may see that there is no further likelihood of delay by the plea or demurrer put in, or by the commission to answer granted. *Gill. For. Rom. 71.*

The present practice is upon payment or tender of the costs to the clerk in court, which, upon an arrest, are one pound three shillings and sixpence, otherwise one pound one shilling and six pence, to enter an appearance, or if the process issued for want of answer upon the like tender or payment to move or petition for time to answer (and in a country cause a commission to take the answer) stating the party is in contempt; but the court will not give the same time as if no contempt had been incurred.

Commission of Rebellion.

A Commission of rebellion is a writ issuing out of, and under the seal of the court, directed sometimes to the sheriff*, but generally to special commissioners, therein named jointly and severally commanding them “to attach, or cause to be attached (*the defendant*) wheresoever he shall be found within the kingdom of *Great Britain* † as a rebel and contemner of our laws, &c.” and is usually directed to such commissioners whom the plaintiff appoints, commonly four in number. The words of the writ are, that they shall attach the party as a rebel and contemner of our laws; whence it seems the commissioners are authorized to take the party upon a *Sunday*, or in any privileged place, even within the verge of the court of the palace of *Westminster*, or to break open and enter houses; for the design is, that he should not be any where protected by law; but in such case it is adviseable for them to call in the assistance of a peace officer.

It is agreed on all hands, a commission of rebellion may be executed on a *Sunday*, though it issued for want of an appearance, or for want of an answer only. *Arg. 1 Atk. 57.*

The reason why this process is usually directed to commissioners under the Great Seal, and not to the proper mi-

* A commission of rebellion by the course of the court, issues only to the Sheriff of *Middlesex*. *2 Wms. 657. in notis.*

† Before the union of the two kingdoms, the form of the writ was, “*Quod non omittas propter aliquam libertatem, quin eam ingrediar. et prefat. A. B. ubicunq; inventus fuerit infra hoc regnum Angliæ, dom. Walliæ aut vil. Berwici super Tweedam tanquam rebellion. &c.*” or *infra regnum Angliæ tanquam, &c.* *West. Symb. 185.* The act for an union of the kingdoms of *England* and *Scotland* into one kingdom, by the name of *Great-Britain*, occasioned a variation in that part of the writ, and the form is accordingly. The act did not extend the jurisdiction of the court of *Chancery* into *Scotland*, nor can this writ be executed there.

nisterial officer, seems to be, because the Sheriff cannot be supposed to execute all such process in person, and it may be inconvenient to lodge such discretionary powers in the deputies appointed by a ministerial officer; wherefore the court appoints its own commissioners, who are enjoined to do every thing very carefully, and are answerable for their misbehaviour. A party taken upon this commission cannot be bailed by justices of the peace, although the tenor of the writ imports an offence against the peace.

If the process be in execution, as for the contempt of an order of the court, whereby costs are adjudged to be paid, on non-performance of a decree, the commissioners ought not to bail the party, but should keep him in custody, and bring him into court on the day of the return, and get council to move that he be turned over to the *Fleet* prison, where he will remain until he performs the duty, and pays the costs of contempt, which are fifty shillings, and 6 s. 8 d. to each commissioner, who makes a return to the commission.

Commissioners of rebellion not only might but ought to take a bond as a security from the defendant to appear, where it is upon the ordinary process of the court, *though a Serjeant at Arms could not* in that case; but where it is upon an attachment, or contempt of an order of the court, &c. there they ought not to take any security, but to have the body in court at the day of the return of the commission of rebellion. *Bunb. 50.*

A party being arrested upon a commission of rebellion, for breach of a decree, was imprisoned for six weeks in the commissioner's house, and other places, and refused bail for his appearance to answer the contempt, &c. Defendant had, by order, entered his appearance upon the said writ by his Clerk in court; upon reference to the Six-clerks, they certified, *that the commissioners may either take or refuse bail at their discretion; but if they refuse, they ought to bring the party up to the court without delay*, and that bail was offered. The court, upon reading a precedent, ordered the

commissioner to stand committed for his abuse, and to pay defendant his costs and charges sustained by his imprisonment to be taxed. 1 *Ch. Rep.* 262. *Inglet v. Vaughn.*

If the defendant be taken upon a commission of rebellion which issued irregularly, the defendant shall have costs. 1 *Vern.* 269. And if an action at law be brought for an assault and battery, or false imprisonment, in executing a commission of rebellion, an injunction will be granted, because the irregularity ought to be punished in this court, and can be only determined and examined here, at law supposing the commission issued regularly, they will not allow that as a justification. 1 *Vern. ut supra.* And if an indictment be preferred, though the court has not originally and strictly any restraining power over criminal prosecutions, and cannot interpose by injunction, yet it may make an order upon the prosecutor to stay the proceedings on an indictment in certain cases. 2 *Atk.* 302. *Mayor & Co. of York v. Pilkington, Bart.*

If the commissioners permit the party to escape, they will be committed till they produce him, if the escape be with their consent, till they pay the debt.—If the defendant be rescued, the rescuer will be committed.

One of the commissioners letting the defendant escape, being taken upon a commission of rebellion, was to stand committed to prison, till he bring in the defendant. *Toth.* 38.

Commissioners upon a commission of rebellion, letting the party in contempt go where he listed, ordered to be committed till they pay the debt. *Toth.* 40.

A rescue was returned upon a commission of rebellion against *Bonville*, who being examined, and his examination referred to two masters, was found to have confessed the rescue, whereupon he was committed to the *Fleet* prison, and yet afterwards brought his action on the case at law against the commissioners for a false return: ordered that a *subpœna* be awarded against the said *Bonville*, to shew cause why an injunction should not issue to stay proceedings at law; but afterwards

terwards defendant was allowed to proceed at law, because either of the parties may plead the special matter. *Bonville v. Bonville*, Ca. 152. *Pra. H. Ch.* 140.

If the commission of rebellion be in mesne process, and has a long return, the commissioners should admit the party to bail, taking a bond from the party, with two or more sureties, in the penalty of two hundred pounds, for his appearing, or answering, and costs. *Toth.* 37. The condition of such bond may be as follows:

“ The condition of this obligation is such, that if the
“ above-bounden *A. B.* shall and do personally appear be-
“ fore our Sovereign Lord the King, in his Majesty’s High
“ Court of Chancery, on (*insert the day on which the process*
“ *is returnable*), upon a commission of rebellion, issued out
“ of the said court against him, at the suit of *C. D.* and shall
“ answer as well for his said contempt, as for all such
“ things as shall be then and there objected against him,
“ and do and perform what the said court shall award, or
“ order in that behalf, then the present obligation to be
“ void, or else to remain in full force and virtue, &c.”

Defendant this day made his personal appearance upon a commission of rebellion, for saving his bond made to the commissioners in that behalf. *Brown v. Derby*, Ca. 82.

Commonly it is used to take the bonds in the name of the Lord Chancellor, Lord Keeper of the Great Seal of *England*, the Master of the Rolls, or to any two of the Masters of the Chancery, all which are good and allowable by the practice of the court of Chancery. *Ut supra.*

Defendant this day made his personal appearance in the court, upon a commission of rebellion, according to his bond made to the Right Honourable the Lord Keeper in that behalf. *Prac. H. Ch.* 110.

The return to this process is made by two or more of the commissioners who act under it; if they refuse or neglect to make a return at the court, on motion or petition, will

Commission of Rebellion.

order them to return it; and upon disobedience to the order, the court will upon motion grounded upon affidavit of service of the order commit them; for, not being parties to the suit, no writ of execution of the order is required to bring them into contempt,

A commission of rebellion for non-performance of costs was awarded against defendant, to one *John ap David*, who did thereupon apprehend defendant, and, for his more safe keeping, delivered him to the Sheriff, who took charge of the prisoner accordingly, and now refuses either to deliver the prisoner to the commissioner, or to bring him himself into court at the day. A day is therefore given to the said Sheriff to bring into this court the body of the said defendant by *Thursday* next, upon pain of ten pounds. *Ca.* 150. *Evans v. Rees*.

This process is made out by the Clerk in court, upon producing the writ of attachment with proclamations returned *non est inventus* by the proper officer. The form of the writ is as follows;

“ *GEORGE* the Third, by the Grace of *GOD*, &c.
 “ To *Edward Mayot, William Warne, John Smith*, and
 “ *Harry Bateman*, Gentlemen, greeting: Whereas by
 “ public proclamations made on our behalf by the Sheriff
 “ of *Middlesex*, in divers parts of that county, by virtue
 “ of our writ to him directed, *Robert Edwards* hath been
 “ commanded, upon his allegiance, personally to appear
 “ before us, in our court of Chancery, at a certain day
 “ now past: yet he hath manifestly contemned our said
 “ command. Therefore we command you, jointly and
 “ severally, to attach, or cause the said *Robert Edwards*
 “ to be attached, wheresoever he shall be found with-
 “ in our kingdom of *Great Britain*, as a rebel and con-
 “ temner of our laws, so as you have him, or cause him
 “ to be before us in our said court, on (*insert return day*)
 “ wheresoever it shall then be, to answer to us as well
 “ touching

Commission of Rebellion.

121

“ touching the said contempt, as also such matters as shall
 “ be then and there objected against him, and further to
 “ perform and abide such order as our said court shall make
 “ in this behalf. And hereof fail not. We also hereby
 “ strictly command all and singular mayors, sheriffs, bai-
 “ liffs, constables, and other our officers and loyal sub-
 “ jects and servants whomsoever, as well within liberties
 “ as without, that they, by all proper means, diligently
 “ aid and assist you, and every one of you, in all things,
 “ in the execution of the premises. In testimony whereof
 “ we have caused these our letters to be made patent. Wit-
 “ ness Ourself at *Westminster* this ——— day of ———,
 “ in the ——— year of our reign,

Note this is not a commission of rebellion

Sewell, Reynardson.

The names of the Master of the Rolls, and the Six-clerk, are subscribed to this writ, and then it is to be folded up as an injunction, and indorsed “ By the court a commission of rebellion,” (*for want of an appearance or of an answer, or non-performance of a decree, order, &c. as the case is*) “ at the suit of ——— plaintiff.” Near the bottom, write the Master of the Rolls and Six-clerk’s name, and on the label the Clerk in court’s name.

The commission being thus made out; upon a sheet of treble fixpenny stamped paper, and a sheet of paper unstamped, make two docquets in the following form :

The King and so forth. A commission of rebellion directed to (*insert commissioners names*) jointly and severally, to attach *Robert Edwards*, defendant, for want of (*appearance answer, &c. as the case is*) at the suit of *Charles Banbury*, plaintiff, returnable ———. Witness the King at *Westminster*, the ——— day of ———, in the ——— year of his reign,

Sewell, Reynardson.

Lee, Clerk.

The

Commission of Rebellion.

The Master of the Rolls and Six-clerk's names being subscribed, as before, fold up the docquets like an order, and indorse on the back of each of the docquets, near the top, "Commission of rebellion, *Banbury* against *Edwards*," and near the bottom the Master of the Rolls, Six-clerk, and Clerk in court's names. The commission being given to the Bag-bearer of the office, to be sealed together with the docquets, he leaves the docquet unstamped with the entering Register, to be marked with an *intratur*, and procures the docquet, upon stampt paper, to be signed by the Lord Chancellor, and leaves it with the Clerk of the Hanaper office: the commission is brought back sealed, and left with the Clerk in court, and delivered to the Solicitor, or to the Commissioners to be executed.

There must be fifteen days between the *teste* and return of this and the several processes in proceeding to a sequestration, unless an order be obtained to make it returnable *immediate*.

The defendant was apprehended upon commission of rebellion, where neither attachment nor proclamation were entered with the Register; therefore discharged of the commission of rebellion and contempt; and *Thomas Flower*, one of the clerks of the court that made out the commission of rebellion, to pay the defendant such costs for his vexation as Doctor *Lewis*, one of the masters of this court, shall assess. *Prac. H. Ch.* 154.

The wife was apprehended by a commission of rebellion, for that her husband and she have not answered the plaintiff's bill; and being taken, was carried bound to prison, and kept there in very strict fort. Although her husband is not brought in to answer, without whom she is not compellable to answer; therefore it is ordered, that the writ be discharged, until she and her husband may be brought together to answer; and in respect the wife was unorderedly brought in without her husband, and so hardly dealt with, the plaintiff shall pay unto her costs as the court shall award. *Rose v. Bourne. Prac. H. Ch.* 171.

Serjeant

Serjeant at Arms.

THE office of Serjeant at Arms is held by patent from the crown for life: the Serjeant at Arms attends upon, and bears a gilt mace before the Lord Chancellor, Lord Keeper, or Lords Commissioners for the custody of the Great Seal. This officer has several deputies, some of whom are used as and called messengers *, (as is said) before a commission of rebellion.

By this officer the court executes its process, in taking persons into custody, who refusing or neglecting to perform a decretal sentence of the court, have stood out in contempt until a commission of rebellion in execution of a decree or order hath been returned *non est inventus*: or on mesne process, when obedience to the rules and orders of practice, in certain cases, and a *cepi corpus* hath been returned, and bail taken by the Sheriff, a Messenger, or deputy of this officer is ordered to bring up the party, unless there be other detainers against him. The interposition of this officer is necessary when plaintiff intends to sequester defendant's real and personal estates and effects; the three before mentioned processes not having effectuated the purport for which they issued, the court, *ex abundanti cautela*, presuming there might be some negligence in the ordinary officers or ministers of justice, or lest the commissioners in the commission of rebellion (persons nominated and appointed by the complainant) should collude with or be warped in favour of their employer to the prejudice of the defendant: to satisfy it's conscience, and be informed whether the defendant doth actually hide himself from justice, or not; the court always sends an officer of its own; and this process must be applied for, and the default certified by the officer before a sequestration can be regularly issued, unless the

* 1 Vern, 344 Prac. Reg.

party be a peer or peerefs of the realm, a biſhop, a member of the Houſe of Commons, or an abſconding defendant proceeded againſt according to the *ſtat. 5 Geo. 2. c. 25.*

Several abuſes having crept into this practice, an order was made by the Lord Keeper *Finch*, reciting, that upon complaint made by the Serjeant at Arms attending the Great Seal, that after contempts are proſecuted to a Serjeant at Arms and a commitment pronounced, the proſecutor will draw up the order, and never take forth a warrant thereon, but make uſe thereof to force the party proſecuted into ſome compoſition, ſometimes for the whole matter in difference, but uſually for the diſcharge of the contempts, whereby the Serjeant's employment is rendered in great part ineffectual; for prevention whereof, *his Lordſhip doth order*, that after any order for a Serjeant at Arms ſhall be granted by the court, the register ſhall, on requeſt, draw up the ſaid order, and deliver the ſame to the Serjeant at Arms or his deputy, and no other perſon, they paying for the ſame; by which means he ſhall or may endeavour to apprehend the party proſecuted, and bring him into this court to answer his ſaid contempt if he can; but if he cannot, his lordſhip doth further order, that no order for a Serjeant at Arms drawn up and paſt the register be diſcharged, and the contempt thereupon, without the Serjeant's fees be paid to him, and a certificate under his hand, certifying the ſame; and after the ſaid order being ſo drawn up, and paſſed as aforeſaid, no private or other agreement ſhall be made between the party or parties, or the perſon or perſons ſo ſtanding in contempt as aforeſaid, or any other perſon there, or any on their behalfs, without ſuch ſatisfaction ſhall be made, and a certificate of the ſame ſhall be produced to the court——*Ord. Cant. 151. 26 Car. 2. Revived by the Lord Keeper by order, dated 13 July, 1685. 1 Ja. 2. ——— Revived again by order 6 June, 1694. 6 Wm. 3. whereby it was alſo further ordered, that when*
any

any motion shall be made for a Serjeant at Arms, the council moving for the same shall immediately, in court, deliver unto the Register the commission of rebellion, and tell who is Clerk in court, that the Serjeant at Arms may have an account of him where the contemner lives, and that the order be drawn up by the Register, and delivered to the Serjeant at Arms or his deputy, they paying for the same, to take out a warrant thereon, whereby the party or parties so in contempt may be taken into custody, and be brought into this court to answer the same. *Ord. Canc. 199.*

By order, dated 13th May 1721, 7 Geo. 1. reciting that, upon petition of the Serjeant at Arms, setting forth that he is intitled to take all persons into custody who stand in contempt to a commission of rebellion, returned *non est inventus*, and further stating that several orders of commitment (for certain contempts in the said petition contained) had been executed by the Warden of the *Fleet*, or else he had made returns *non est inventus*, whereupon sequestrations have been obtained contrary to the rules of the court, that the said petition came on to be heard before his lordship, and upon hearing several precedents, and what was alleged on either side, his lordship declared that no sequestration can regularly issue to sequester the estate of any person who cannot be found, but upon the return *non est inventus* of the Serjeant at Arms, and doth therefore order that from henceforth, where any person is in contempt, either for want of an appearance or answer, or for not yielding obedience to any order or decree of this court (unless it be for contemptuous language, or the beating or abusing any person in the serving of the process of this court, or other contempts of the like nature), the Serjeant at Arms attending this court, do apprehend and bring the contemner to the bar of this court to answer such contempt; but if the contemner cannot be found, then to return *non est inventus*, to the end a sequestration may regularly issue according to the ancient usage and practice

of this court ; and that process do for the future issue accordingly, and that it be made a part of all orders for giving time to answer, or for doing any other act upon the party's entering his appearance with the Register, that the party, when he enters such his appearance, do likewise consent that a Serjeant at Arms shall go against him, as upon a commission of rebellion returned *non est inventus*, in case of non-compliance. *Ord. Can.* 200.

This last order seems to have been made to correct the irregularity of issuing sequestrations upon the return of the Warden of the *Fleet*.

If a party be taken by the Serjeant at Arms in execution, he must be kept in custody till the return, and then brought up to the bar of the court ; or if he be taken for want of appearance, or answer, upon entering his appearance or filing his answer, and paying costs of contempt, he should be discharged, (for the Serjeant at Arms can take no bail-bond) ; and if plaintiff's Solicitor refuse to discharge him, the court will, on motion or petition.

An order for the Serjeant at Arms is granted on the return of *non est inventus*, upon a commission of rebellion upon motion in court. When a person moves for a Serjeant at Arms, upon a commission of rebellion returned, the commission of rebellion is always produced, and is in the hands of the counsel, who makes the motion, he delivers it into court, and it is left with the Register.

The reason why this process is obtained upon motion only, is because there is nothing to issue under the Great Seal, so that since there is no process under the seal to make it a record of the court, there must be an act of the court to send the Serjeant at Arms.

The order for the Serjeant at Arms being drawn up, passed and entered, the Clerk in court or Solicitor gives it to that officer, who procures a warrant thereon, and at the return thereof certifies in what manner he has acted under it. The return which he makes upon the back of the warrant must be filed at the Report office, before a sequestration

questration can regularly issue*. The costs are not settled as upon the former processes, but are to be taxed by the Clerks in court for plaintiff and defendant, and are according to the distance the Serjeant has to seek for the party.

Where a party has had the usual orders for time to answer, and by a subsequent order is to enter his appearance with the Register, and submit that the Serjeant at Arms should go without further motion, in such case the Serjeant at Arms is granted upon a certificate of the Six-clerks, that the answer is not filed*.

The party taken upon this process must clear his contempts, and pay the costs, before he can be released, and if it be in execution, he must be detained in custody, and brought into court, and, upon motion, committed to the Fleet until he perform the matters decreed.

Sequestration.

THE process of sequestration is a writ or commission issuing under the Great Seal, sometimes directed to the Sheriff or (which is most usual) to certain persons of the plaintiff's own naming, empowering him or them, to enter upon, possess, and sequester the real and personal estate and effects of the defendant, (or some particular part or parcel of the lands), and to take, receive, and sequester the rents, issues, and profits thereof, and keep the same in their hands, or pay them in such manner, and to such persons as the court shall in its discretion appoint, until the parties shall have appeared to or answered the defendant's bill, or performed some other matter which has been ordered and enjoined by the court, in the process specifically mentioned, and for not doing whereof, he is in contempt.

There were great struggles between the courts of common law, and the courts of equity before this process was established; the former holding that a court of conscience could only give remedy *in personam*, and not in

* 3 Aik. 569.

rem *, and that sequestrators were trespassers against whom an action lay; in *Blagrove v. Watts*. such commissions were adjudged to be against law, for that if a man be sued in a court of conscience, and will not obey, his body is to be imprisoned, and no commission ought to be awarded for the taking of his goods †. The chancellor, in *Colston v. Gardiner* ‡, cites a case of an indictment for murder, for laying on a sequestration, one being killed. Question was, if justifiable, or not? Pardon sued out. 20 *Jac. Elwes*.

Sequestrations were first introduced in Sir *Nicholas Bacon's* time, and then but sparingly used in process, and after a decree to sequester the thing in demand only ||. It is said the first instance of a sequestration after a decree was in Sir *Thomas Read's* case, in Lord *Coventry's* time; another was issued in *Lakes v. Meares*, 11 *Jac.* §; and in the case of *Hyde v. Pittit*, 1666, and affirmed in parliament ¶; and by the court of *Exchequer* in *Gnavus v. Fontaine*, 1687, and in a case of *Whitham v. Bland*, in Lord *Shaftesbury's* time **.

This process is now become by long use and acquiescence, and is looked upon as, the legal and ordinary process to enforce obedience to the decrees and orders of the court; so that no court will suffer them to be shaken or reflected on ††; and even acts of parliament have by a sidewind countenanced and established them ††.

A sequestration out of Chancery is more effectual than an execution by *fieri facias* at law: for a sequestration may be awarded against the goods, though the party is in custody upon the attachment: whereas at law, if a *ca. sa.* be executed, there can no *fieri facias* issue. *Caf. temp. Talbot* 222.

* *Mod.* 259. † 1 *Moor* 549. *Cro. Eliz.* 651. *Hil.* 41 *Eliz.*
 ‡ 2 *Chan. Ca.* 44. || 1 *Vern.* 421. § *Torb.* 176. ¶ *Bacon's*
Abr. vol. 4. 425. ** 2 *Chan. Ca.* 43. *Barnard.* 431.

†† 5 *Geo.* 2. c. 25. †† 2 *Mod.* 258.

If, before the sequestration awarded, the defendant have conveyed his lands by covin, the sequestration shall be awarded against the defendant and his assigns. 2 *Chan. Ca.* 44.

So if land be settled with a power of revocation, it will be subject to the sequestration, though the decree was for a personal duty, not for land. 1 *Ch. Ca.* 242.

If after a sequestration the goods are embezzled by a stranger, he shall be examined for his contempt. 2 *Chan. Ca.* 82.

But a decree in Chancery does not bind the right of the land, but only the person, if he does not obey it. 1 *Roll.* 373. l. 25. 4 *Inst.* 84.

Copyholds may be sequestered, though not extendible at common law, or the *stat. of Westm.* 2. For courts of equity have *poteſtatem extraordin. et abſolutam*: but it seems a doubt, whether such a sequestration can be revived against the heir of the copyholder, which arises from the difficulty of obliging the lord to admit, and depriving the lord of his fine, &c. upon the death of his tenant. 2 *Chan. Ca.* 46. *Barnard.* 431.

The defendant was committed to the *Fleet*, for not performing a decree, and the lands sequestered, and the plaintiff put in possession of the lands which were in mortgage to him. It was insisted that by the plaintiff's having the lands, and by the defendant's being in prison, there was a double execution; but it was ordered with assistance of judges, that the defendant should not be discharged till he had absolutely assured the lands to the plaintiff, or satisfied him his money and damages, and that the plaintiff hold the lands in the mean time. 1 *Chan. Rep.* 152.

Upon affidavit that the defendant was gone into *Holland*, to avoid the plaintiff's demand against him, and he having been arrested upon an attachment, and a *cepi corpus* returned by the Sheriff, the court, upon motion, granted a Serjeant at Arms against him, and upon the return thereof granted a sequestration. 1 *Vern.* 344.

A sequestration goes not till suit revived against the heir, unless the father's conveyance be pleaded. 2 *Chan. Ca.* 46.

A decree for a debt does not bind the real estate, acting only *in personam*, not *in rem*, and the remedy upon a decree to affect the land is only for a contempt, whereupon the party proceeds to a sequestration: which process is not of very long standing: and that a sequestration is but a personal process, appears by its falling and abating by the death of the party; an extent upon a judgment does not so abate. 2 *Wms.* 620.

After the defendant was committed for non-performance of a decree, yet the court ordered that a sequestration should be granted to levy money of his in *other men's hands*; and he was committed because his wife would not bring in bonds after. *Toth.* 273. *Lakes v. Meares.*

The defendant being in the *Fleet*, the money decreed was sequestred, it being in the *Fleet*. 1 *Chan. Ca.* 92.

Defendant being in contempt for disobeying a decree, and being a prisoner in *Bristol*, was brought thence by *habeas corpus*, and turned over to the *Fleet*, and refused to obey the decree. The court ordered a sequestration against his real and personal estate. 2 *Chan. Rep.* 151.

If a Prebend has a distinct corpse it may be sequestered, but where he is only a member of the body aggregate, and the inheritance is in the Dean and Chapter, there cannot be a sequestration. 1 *Salk.* 320.

A sequestration *nisi* is the first process against a Peer or member of the House of Commons; but when it is granted against a Peer for want of an answer, it is good cause against such order *nisi* to shew that the answer is put in, which must be allowed, and when that answer is reported insufficient, the plaintiff must move *de novo* for a sequestration *nisi*. 2 *Wms.* 385.

If there be a sequestration *nisi* for want of an answer against a member of Parliament, and he puts in an answer before the order is made absolute, and exceptions are taken
to

to this answer, the court will *enlarge the time for shewing cause* till it shall appear whether the answer is sufficient or not.

3 *Att.* 740 *Butler v. Rashfield.*

A sequestration was granted against an infant Peer for not appearing, and the sequestrators received the rents.
2 *Chan. Ca.* 163.

If a Peer of the realm appears and does not answer, formerly an attachment lay, but now by order of Parliament no process lies, but a sequestration. *Comb.* 62.

A sequestration, unless cause, was ordered, both against the Countess Dowager of *Shaftsbury*, and the Countess of *Gainsborough*, for a contempt, in contriving and effecting the marriage of the Earl of *Shaftsbury*, an infant, without consent of his guardian, named by his father's will, and without applying to the court, the matter of the said infant and guardian being then before the court; but this matter being brought before the Lords Commissioners, after the removal of Lord *Macclesfield*, it was observed that this contempt was not sworn upon the Lady *Gainsborough*, whereas *an order for a sequestration is a judicial act of the court, and therefore must be founded upon a proper affidavit*, as he (Lord Commissioner *Gilbert*) apprehended, and said *that the order is the judgment of the court, and the sequestration, the execution, and the judgment ought not to be founded upon conjecture only: for if she be examined upon subsequent interrogatories, this will not make good the determination of the court, by a matter ex post facto.* *Gilb. Eq. Rep.* 178. 2 *Wms.* 110.

Where the sequestrators seize the real estate of the party, any tenant or other person who claims title to the estate so sequestered, either by mortgage, judgment, lease or otherwise, who hath a title paramount to the sequestration, shall not be obliged to bring a bill to contest such title, but he shall be let in to contest such a title in a summary way: he may move by his council as of course to be examined *pro interesse suo*; and in this case the plaintiff is to exhibit interrogatories in order to examine him for a discovery of his title to the estate, and he must be

examined upon such interrogatories accordingly: and the master must state the matter to the court, and the parties may enter into proof, touching the title to the estate in question; and when the master hath stated the whole matter, the court proceeds to give judgement therein upon the report; and if it appear that the party who is examined *pro interesse suo*, hath a plain title to the estate, and is not affected with the sequestration, then it is to be discharged as against him with or without costs, as the court shall determine upon the circumstances of the case, and so *vice versa*. *Bac. Abr.* vol. 4. 427.

A sequestration binds from the very time of awarding the commission, and not only from the time of executing of it, and its being laid on by the commissioners: for if that should be admitted, then the inferior officer would have *ligandi et non ligandi potestatem*. 1 *Vern.* 58. *Burdet v. Rockey*.

Bill to revive a sequestration obtained against defendant's husband, for a personal duty before his intermarriage with the defendant, and to avoid the defendant's dower in the lands sequestered before the marriage, insisting, that these lands were so bound and covered by the sequestration, that the defendant's right of dower could never attach. Demurrer thereto, and allowed. 1 *Vern.* 118. — On demurrer, Lord Keeper inclined, that a sequestration for a personal duty determined with the death of the party, and could not be revived against the heir. *Burdet and Rockley* was cited, where it was ruled such a sequestration should not bind the feme, who came in for her jointure or dower. 1 *Vern.* 166. And it seems now to be settled, that a sequestration is a personal process which abates by the death of the party; so that such sequestration being grounded on a decree for a debt or personal duty, cannot be revived against the heir of the defendant, *secus* in those cases in which the heir is bound. 2 *Wms.* 621.

Upon a question, whether a sequestration issued to compel performance of a decree, abated by death of plaintiff. *Per*

cur. It is clear a sequestration issued to compel performance of the decree abates by the death of the plaintiff: in an *extent* no right is vested; a *liberate* being necessary; which comes near to the case of a sequestration and that partakes not of the nature of a *fi. fa.* but of a writ of extent on a recognizance or *distringas*; vesting no right in the party because the execution is not complete, but a further act of the court is necessary, which, whether by process or order, makes no difference, and that further act is that after seizure by the commissioners of the goods, and profits of the lands, and return to the court, the party must apply to the court to have an account of the sequestration taken, and an order made for sale of the goods, towards satisfaction of the duty decreed him, without which he cannot have it. For the writ of sequestration does not require the sequestrators to levy to the use of the plaintiff, but only to detain and keep in their hands till the sum is fully paid, the contempts cleared, and the court make further order to the contrary. It is not of a great many years standing, that the court has ordered goods to be sold, to satisfy payment after a decree; but it is very lately that the court has ordered it for a collateral contempt in proceedings before a decree, which the court now does in aid of its proceedings. By the plaintiff's death therefore, before that further act, something must be regularly done, by the executor to revive the process and suit, the party having a right to make a defence thereto; for he may set up some collateral bar; as in case of a will, he may deny the seal of the ordinary, and the law books suppose he may be able to shew a release. 1 *Ves.* 180. *Wharam v. Broughton**.

In Chancery not only the body of the defendant, but also his lands and goods are liable to a sequestration; but no sequestration lies, till the time for the return of the attach-

* A sequestration that issues as mesne process, falls with the death of the person, *scilicet* where it issues for non-performance of a decree. 3 *Atk.* 594. 1 *Vern.* 58. *Sed quæ.*

ment is out on which the body was taken ; for, until the return of the writ, it is quite uncertain whether the defendant will pay the money, or no ; it is reasonable a sequestration should lie, in case one taken into custody by process of Chancery continues in prison without paying his debts. 3 *Wms.* 240. *Martin v. Kerridge.*

On the return of an attachment for non-performance of an order against one in the *Fleet*, the next process is a sequestration. *Mof.* 301.

A sequestration against lands and goods, where the thing decreed was a personal duty. 1 *Chan. Ca.* 92.

A voluntary conveyance on purpose to bar sequestration, void. 2 *Chan. Ca.* 92.

A sequestration was executed upon lands of the husband, out of which the wife had an annuity in lieu of jointure ; upon the death of the husband, the court discharged the sequestration as concerning those lands. 1 *Chan. Rep.* 247 *Proctor v. Reynel.*

So a sequestration upon a bill for a personal duty, does not avoid the dower of the wife, though the sequestration was before marriage. 1 *Vern.* 118. *Anon.*

If one defendant cannot be found to serve process on him, if process be against him till sequestration, and he shall not appear, you proceed against the rest, as when one is outlawed at common law. 2 *Chan. Ca.* 139. *Dic.*

Where a defendant is out of the reach of the court and cannot be made to appear, it amounts to the same thing as if the plaintiff had taken out process for want of an appearance, and carried it through the whole line of process to a sequestration. 2 *Atk.* 510. *Dauvent v. Walton.*

If a necessary defendant be prosecuted regularly to a sequestration, the plaintiff may go on without him against the other defendant. *Preced. in Chan.* 99. *Parker v. Blackborne.*

After service of a writ of execution of a decree against a corporation, the next process is a *distringas*, and after that a sequestration, which being once awarded, they can

never afterwards come to enter their appearance, as they might have done on the *distringas*. *Preced. in Chan.* 128. *Hervey v. East India. Co.*

One of the defendants is in contempt, and stands out to a sequestration, and the cause is heard against the other defendants: yet he may come in, and answer; and the cause may be heard again as to him. 1 *Vern.* 228.

A sequestration, which is a kind of suspension *nisi*, was granted against the Warden of the *Fleet*, for not answering; he being supposed to be always personally present in court. *Mof.* 238.

If the goods sequestered are not sufficient to satisfy his demands, the plaintiff may move to revive the order for a Serjeant at Arms. *Mof.* 246.

A sequestration must be returned, before it can be moved to discharge it on the death of the party as to lands. *In Scacc. Bunb.* 31.

Sequestrators, for want of appearance after seizure of *some* goods, ought to apply to the court for further directions for seizure, for the process is to be looked upon only as a *distringas ad infinitum* at law: sequestrators, for want of answer, have no power to sell, or even remove goods, for the goods are to be retained in the nature of a pledge, to answer the contempt, and the plaintiff receives no injury, for he may hear his cause *pro confesso*: if the sequestrators do remove the goods, an attachment may be moved for against them. *In Scacc. Bunb.* 272.

After goods or a real estate are seized upon a sequestration for want of an answer, the plaintiff may still proceed till he has got the bill taken *pro confesso*. 2 *Atk.* 23. A plaintiff cannot have the same benefit in carrying on the several processes upon a contempt of the defendant before the hearing, as upon an absolute decree; for in the latter case the plaintiff, after the processes have been executed, and goods and estate sequestered under them, may have both applied to satisfy his demand, which he cannot have upon processes for contempt only; and therefore there is a

material and essential difference between the two. *Dic. ut supra.*

Where a defendant, for want of putting in his answer, has stood out the whole line of process to a sequestration, and the bill taken *pro confesso* on a decree against him *ad computandum*, the court will not discharge the sequestration on payment of costs of the contempt only, but will keep it on foot as a security to the plaintiff for the defendant's appearing before the Master to take the account. 3 *Atk.* 468. *Maynard v. Pomfret.*

This writ is always obtained upon motion; if it be moved for upon a return of *non est inventus* by the Serjeant at Arms, the council who moves has the warrant with the return in his hand. Sometimes it is applied for upon a certificate from the Warden of the *Fleet* of the party being in his custody for non-performance of an order*. If the party in contempt resist the Serjeant, or, when he is taken, make his escape, and stand out in contempt; in such cases, upon affidavit of the facts, the court will, upon motion, grant a sequestration.

It is commonly directed to four persons, whom the plaintiff names, authorizing any two or more of them to execute the same.

No sequestration, dismissal, &c. are to be granted upon petition. *Ord. Canc.* 123.

The order for a sequestration being drawn up, passed and entered, is to be left with the plaintiff's Clerk in court, together with the names of the persons whom the plaintiff chuses to have inserted as commissioners, and the Clerk in court will make out the writ; the form whereof is as follows:

" *GEORGE* the Third, by the Grace of *GOD*, of
 " *Great Britain, France, and Ireland*, King, Defender of the
 " Faith, and so forth. To *Edward Mayott, John Smith,*

* *Mof.* 301. 1 *Ch. Ca.* 92.

" *William*

“ *William Warne, and Thomas Barnes*: Whereas *A. B.*
 “ complainant, exhibited his bill of complaint into our
 “ court of Chancery, against *C. D.* defendant*: And
 “ whereas the said *C. D.* being duly served with a writ is-
 “ suing out of our said court, commanding him, under the
 “ penalty therein mentioned, to appear to and answer the
 “ said bill † hath [refused so to do] and thereupon all pro-
 “ cess of contempt hath issued against him unto a Serjeant
 “ at Arms: And whereas the said *C. D.* hath of late ab-
 “ sconded, and so concealed himself that the said Serjeant
 “ at Arms hath not been able to find him, as by the cer-
 “ tificate of the said Serjeant at Arms appears: Know ye
 “ therefore, that we, in confidence of your prudence and
 “ fidelity, have given, and by these presents do give to
 “ you, any three or two of you, full power and authority
 “ to enter upon all the messuages, lands, tenements, and

* If the defendant be a Peer of the realm, a Bishop, or a member
 of the House of Commons, the form is thus: *And whereas the*
said A. B. being duly served with a copy of the plaintiff's bill, and
a writ of subpœna issuing out of our said court, commanding him,
under the penalty therein mentioned, to appear to and answer the
said bill, hath † [appeared accordingly: And whereas the said A. B.
hath not put in any answer to the said bill] It was on the ———
day of ——— last ordered, that a sequestration should issue, directed
to certain commissioners therein named, to sequester the said defend-
ant's personal estate, and the rents and profits of his real estate, until
the said A. B. should || [fully answer] the plaintiff's bill, and our
said court make other order to the contrary, unless the defendant,
having personal notice thereof, should, within eight days after such
service, shew unto our said court good cause to the contrary: And
whereas on the ——— day of ———, the said order was made
absolute. Know ye therefore, &c. as above, &c.

If the process be for want of appearance, the words in brackets
 are to be omitted, and instead thereof—“ † not appeared,” and
 the words “ || appeared to” are to be inserted.

† *Hath appeared, but refuses to put in any answer thereto, if it*
be for want of answer, and the words in the brackets are to be
omitted.—The form of the above writ is for want of appearance.
 real

“ real estate whatsoever, of the said C. D. and to take,
 “ collect, receive and sequester into your hands, not only
 “ all the rents and profits of the said messuages, lands, te-
 “ nements, and real estate, but also all his goods, chattels,
 “ and personal estate whatsoever : And therefore we com-
 “ mand you, any three or two of you, that you do, at cer-
 “ tain proper and convenient days and hours, go to, and
 “ enter upon, all the messuages, lands, tenements, and
 “ real estate of the said C. D. and that you do collect, take,
 “ and get into your hands, not only the rents and profits
 “ of all his said real estates, but also all his goods, chattels,
 “ and personal estate, and detain and keep the same under
 “ sequestration in your hands, until the said C. D. shall
 “ fully answer the complainant’s bill, clear his contempts,
 “ and our said court make other order to the contrary.
 “ Witness Ourself at Westminster the ——— day of ———,
 “ in the ——— year of our reign.”

Sewell, Reynardson.

This writ is folded up like an injunction, and the Master of the Rolls and Six-clerk’s surnames subscribed, and indorsed, *A commission of sequestration against C. D. defendant, at the suit of A. B. complainant* ; and the Master of the Rolls, Six-clerks, and the sworn Clerk’s names. There must be fifteen days between the *teste* and return.

The Clerk in court gives this commission to the Bag-bearer of the Six-clerk’s office, to be sealed ; which being done, he leaves it at the Clerk’s seat in the office, to be given to the Solicitor when he calls.

The sequestrators are officers of the court, and as such are demeanable to the court, and are to act from time to time in the execution of their office as the court shall direct ; they are to account for what comes to their hands, and are to bring the money into court as the court shall direct, to be put out at interest, or otherwise as shall be found necessary ; but this money is not usually paid to the plaintiff, but is to remain in court till the defendant hath appeared

or

or answered, and cleared his contempt, and then whatsoever hath been seized shall be accounted for and paid over to him: However, the court hath the whole under their power, and may do therein as they please, and as shall be most agreeable to the justice and equity of the case.

The plaintiff's council may move and obtain an order for the tenants to attorn, and pay their rents to the sequestrators, or for the sequestrators to sell and dispose of the goods of the party, and to keep the money in their hands, or bring it into court, as shall be most adviseable and discretionary, and fitting for the court to do. *Bac. Abr. vol. 4. 427.*

Tenants refused to pay their rents to the sequestrators, and an injunction was awarded against them to pay their rents. *2 Chan. Ca. 163.*

Sequestrators on mesne process are accountable for all the profits, and can retain only so far as to satisfy for the contempts. *1 Vern. 248.*

If sequestrators, having power to fell timber, dispose of 7000 *l.* worth, and only bring 2000 *l.* to account, they, as officers and agents of the court, are responsible, and not the plaintiff. *1 Vern. 161.*

Sequestrators being in possession of a great house in *St. James's Square*, which was the defendant's for life, the court ordered, that the Master allow a tenant for the house, and the sequestrators to make a lease, and the tenant to enjoy. *3 Ch. Rep. 87.*

The court will not make an order on a plaintiff to pay a sequestrator his fees, who has made no return of the goods sequestered, but has delivered them over many years since, and made no demand upon the plaintiff since. *3 Atk. 594.*

If plaintiff calls for account of goods sequestered, the sequestrator may set off his fees, whatever length of time has elapsed without demand, provided he has made a return from time to time of what he seized. *Ibid.*

The

Sequestration.

The costs attending the suing out and executing this writ, are to be taxed by the Master. Sometimes the sequestrators are allowed poundage, or 6s. and 8d. a day, and other contingent expences, or a gross sum.

An exception was taken by a sequestrator to a Master's report, for not allowing him 6s. and 8d. a day. *Per cur.* A sequestrator is not intitled to an absolute stated fee of 6s. and 8d. a day; the Master has allowed a gross sum, which is sufficient. 2 Atk. 542. *Wood v. Freeman.*

Distringas.

A Corporation being an ideal and invisible person, existing only in contemplation and intendment of law, cannot be attached or apprehended, but must always appear by attorney. The proceedings to compel an appearance, are by distraining the property of the corporation, and thereby obliging the members thereof, in their corporate capacity, to conform to the rules and orders of practice, or to pay obedience to, or perform a duty enjoined by interlocutory orders, or an absolute decree of the court,

All corporations aggregate must sue and defend by attorney.

A body corporate regularly served with *subpoena* or other process, and refusing or neglecting to enter an appearance, or answer according to the rules and orders of practice, must be compelled thereto by the writs of *distringas* and *sequestration*.

The writ of *distringas* is the first process to enforce obedience: this writ issues under seal directed to the Sheriff, commanding him to distrain the goods and chattels, rents and profits of the corporation, until they shall obey the summons or directions of the court: if they persist in their contempt, the court will grant a sequestration. Upon the first writ the Sheriff generally levies 40s. issues, upon the *alias distringas* 4l. on the *pluries distringas* he levies

levies the whole property, and on the return of the *pluries* the court will, upon motion, grant a sequestration.

Where a corporation, which has no property, is a co-defendant, plaintiff may take out a *distringas* against the corporation, and have it returned *nihil*, and so get a sequestration against them, and then, by the course of the court, the plaintiff need not bring them to a hearing. *Arg. 1 Vern. 121.*

In the case between Dr. *Salmon* and the *Hamburgh* company, the members in their private persons were made liable, the company having no goods. *2 Vern. 396.*

Plaintiff had a decree against defendants for a large sum of money, and served them with a writ of execution in the usual form, and they not performing the decree, a *distringas* was awarded, and 40 s. issues returned, and after, on a motion, a sequestration was ordered *nisi*, and they prayed to enter their appearance with the Register upon the *distringas*, and be examined upon interrogatories, and all proceedings on the *distringas* in the mean time might be stayed. *Per cur.* There being a decree, execution is to go without their being farther heard, as at law; but where a decree *agit in personam*, there the defendant shall be examined in favour of liberty, to shew cause why he should not be committed. *2 Vern. 394. Harvey v. East India Company.*

The *distringas in process* against a corporation, is to answer as well the contempt as the bill of complaint; but when upon a decree, it is *ad comparandum et solvendum*; and in the case of *Doctor Hussy v. Grocers company*, a sequestration issued on the return of the first *distringas*; and the court in this case refused to grant any stay of process, or for the defendants to be examined. It was objected that the service of the writ was upon the governor of the company only, who has no power over the company's cash, and could not pay the money; and said, the service ought to have been on the committee; but this was over-ruled; for that if the committee would not meet, or
not

When the Sheriff has made a return, and the corporation stands out in contempt, an *alias distringas* must be awarded in like manner, and after that is returned, and the contempt be not cleared, a *pluries distringas*, upon which the Sheriff will distrain the whole of the property, and when that is returned, a sequestration may be moved for ; which the court will order of course, and will not discharge until the corporation has appeared or answered, or performed what they were ordered or enjoined to do, cleared their contempt, and paid the costs.

Suspension.

THE officers of this court being presumed always to be personally attending, and present in court, the ordinary process awarded against persons in contempt, is not issued in the first instance against them : the proceeding against an officer of the court, duly served with *subpoena*, or other process, and incurring a contempt, is by motion (regular notice being given) to suspend him from his office, which the court grants of course, after which the ordinary process is awarded.

A sequestration *nisi* was moved for against Mr. *Gambiere*, the Warden of the *Fleet*, for not putting in his answer. *Per cur.* It is common to suspend Clerks of courts, and the Warden of the *Fleet*. The Warden of the *Fleet* attends this court by deputy, and therefore no attachment will lie against him ; because he is supposed to be always personally in court, take the order for a sequestration, which is a kind of suspension *nisi*. *Mof.* 238.

Of entering an Appearance with the Register.

IN certain cases of contempt, where the court discharges the party out of custody ; or without incurring a contempt, where a defendant asks an indulgence of the court,

court, as for further time to answer after the usual orders; the court generally obliges the party to enter his appearance with the Register. An appearance with the Register is an appearance upon the records of the court, and differs from an appearance in the office by a Clerk in court: appearing by a Clerk in court, and going away without answering, is merely a foundation to issue process, and there is no record of such appearance: for the Clerk in court only gives notice to the plaintiff's Clerk in court that the defendant appears; and he comes in as upon a *subpoena*, and therefore appears as not in contempt; but when defendant enters his appearance with the Register, he appears as upon an attachment, and appearing upon a contempt, if he comply not with the terms of the order, it is a departure in despite of the court; upon which the court may order an immediate commitment, since this is not merely a contempt of the process issuing, but to the court itself.

In cases of contempt, where the contempt is by beating or abusing the party serving the process of the court, the party is frequently ordered to enter his appearance with the Register, and to be examined upon interrogatories: and in other contempts, where the party is taken, he is frequently discharged out of custody, upon paying or tendering the costs of contempt, and entering his appearance with the Register; and in all cases consenting that a Serjeant at Arms should go against him.

Where a party having obtained the usual orders for time, and is not in contempt, applies to the court for further time; if the court grants further time, it is always a special condition of the order, *That upon the party entering his appearance with the Register by his Clerk in court in six days, thereby consenting that the Serjeant at Arms, attending this court, shall go against him, as on a commission of rebellion, returned, that he is not to be found, in case he does not put in his answer, &c.* within the time limited in the order, or if process of contempt has issued, the order directs the costs to be paid.

An appearance with the Register is generally entered by the Clerk in court, pursuant to an order obtained for that purpose. In the instance of a defendant, after the usual orders for time to answer, applying for further time ; the several orders, together with the process of contempt (if any has issued), should be stated to the court ; and if the court thinks the application reasonable, and gives further time, an order as before mentioned is made, with which the Clerk in court applies to the entering Register, and enters defendant's appearance, at the same time signing a consent in writing, that the Serjeant at Arms should go against the defendant, as in case of a commission of rebellion returned *non est inventus*, in case defendant shall not put in his answer within the time by the order mentioned : the Register at the same time certifies upon the order, the day and month the appearance was entered with him. Where an attachment has issued, and defendant is taken into custody, upon payment or tender of the costs of contempt to plaintiff's Clerk in court, and service of the order, he will discharge defendant of course ; or upon refusal, an application must be by motion or petition to the court.

The method in entering an appearance in other cases is *mutatis mutandis* the same : except in the case of a party in custody for a very gross contempt, as for beating a person serving the process of the court, &c. If the court give him leave to be examined upon interrogatories, touching his contempt, and to be discharged upon entering his appearance with the Register, in such case he is generally brought up in custody.

Of the Defence to Bills.

Of the Persons capable and incapable by themselves of defending a Suit.

ALL Persons capable by *themselves* of instituting a suit, are likewise capable by *themselves* of defending one. If the interest of the Crown, or of those for whom it is a trustee, is concerned; the King's Attorney General, or during the vacancy of that office the Solicitor General, becomes a necessary party to defend that interest. The Queen's Attorney, or Solicitor General, seems to be the party necessary to support her rights. 2 Roll. Abr. 213. *Infants, idiots, and lunatics*, who are incapable by themselves of instituting a suit, are likewise incapable by themselves of defending one. But *married women*, who cannot by themselves institute a suit, may defend by themselves, separately from their husbands with the leave of the Court. *Infants* institute a suit by their next friend: but to defend a suit, the court appoints them guardians, who are usually their nearest relations, not concerned in point of interest in the matter in question. If a person be by age or infirmities reduced to a second infancy, he may also defend by guardian. *Preced. in Ch.* 329. *Idiots and lunatics* defend by their committees. If a married woman claim in opposition to any claim by her husband, or if she lives separate from him, *Preced. in Ch.* 329. *Toth.* 75. or disapproves the defence he wishes her to make, 2 *Atk.* 50. she may obtain an order for liberty to defend the suit separately from her husband.

Of the Nature of the various Modes of Defence to a Bill; and first, of Demurrers.

THE person against whom a bill is exhibited being called upon to answer the complaint made against him, may defend himself. 1. By demurrer, by which he appeals to the judgment of the court, whether he shall be compelled

pelled to answer the bill, or not. *Prac. Reg.* 131. 2. By plea, whereby he shews why the suit should be dismissed, delayed, or barred. *Prac. Reg.* 273. 3. By answer, which confesses and avoids or traverses and denies the several parts of the bill. *Prac. Reg.* 6. *West. Symb.* ch. 194. 4. By disclaimer, which at once terminates the suit, the defendant disclaiming all right in the matter sought by the bill. *Prac. Reg.* 141. 5. By demurrer, plea, answer, and disclaimer, or by two or more of them, each of which must relate to separate and distinct parts of the bill. A defendant may take advantage of many defects in a bill, if they are evident upon the face of it, by way of demurrer.

A demurrer is an allegation of a defendant, which admitting the matters of fact, or some of them, alledged by the bill, to be true, shews, as they are therein set forth, they are insufficient for the plaintiff to proceed upon, or to oblige the defendant to answer, *Lord Raym.* 18. *Prac. Reg.* 131. or that for some reason apparent on the face of the bill, or because of some omission therein, or of the want of some circumstance which ought to be attendant thereon, the defendant ought not to be compelled to answer. It therefore demands the judgment of the court whether the defendant shall be compelled to make answer to the plaintiff's bill, or to some certain part thereof. 3 *Wms.* 80. The causes of demurrer are merely upon matter in the bill, *Prac. Reg.* 132. or upon the omission of matter which by the rules of the court ought to be therein, or attendant thereon; and not upon any foreign matter alledged by the defendant. The principal ends of a demurrer are, to avoid a discovery which may be prejudicial to a defendant, to cover a defective title, or to prevent unnecessary expence. If no one of these ends be attained, there is little use in the demurrer. For, in general, if a demurrer would hold to a bill, tho' the defendant answers, the court would not grant relief upon hearing the cause. There are however cases in which the court will grant

relief upon hearing, tho' a demurrer to the relief would have been allowed. 3 *Wms.* 150. These are principally, where the defendant having submitted to answer, and the cause having proceeded regularly to a hearing, no expence would be avoided by dismissing the bill.

A demurrer must be signed by council ; but is put in without oath, as it asserts no fact, but relies merely upon matter apparent upon the face of the bill. It is therefore considered, that the defendant may, by advice of council, upon the sight of the bill only, be enabled to demur there-to. *Ord. Canc.* 96. For this reason it is always made the special condition of an order for time to demur, plead, or answer to the plaintiff's bill, that the defendant shall not demur alone. Wherever therefore the defendant has obtained an order for time, and is afterwards advised to demur, he must plead to, or answer, some part of the bill. It has been held, that answering to some fact immaterial to the cause and denying combination, do not amount to a compliance with the terms of such an order ; and therefore, upon motion, a demurrer, accompanied by such an answer, has been discharged. 2 *Wms.* 286. But great inconvenience might arise from this determination, if strictly adhered to : For it often happens, that a defendant cannot possibly answer any material part of the bill, without over-ruling his demurrer ; it being held, that if a defendant answers to any part of a bill to which he has demurred, he waives the benefit of his demurrer, 2 *Wms.* 79. 2 *Atk.* 157. or if he pleads to any part of the bill before demurred to, the plea will over-rule the demurrer. 2 *Atk.* 282. For the plaintiff may reply to a plea, or answer, and thereupon examine witnesses, and hear the cause ; but the proper conclusion of a demurrer is, to demand the judgment of the court, whether the defendant ought to answer to so much of the bill as the demurrer extends to, or not. 3 *Wms.* 80. The condition, that the defendant shall not demur alone, seems new, therefore considered more liberally ; and answering any one fact in a bill, and denying combination,

combination, is generally esteemed a compliance with the order. It has been even said, that the court will not incline to discharge a demurrer, if the defendant desires combination only where he cannot answer further without over-ruling his demurrer. 3 *Atk.* 726. Indeed, any material answer must, in many cases, over-rule the demurrer; so that giving a defendant leave to demur, not demurring alone, is often, in effect, giving leave to do a thing, but clogging the permission with a condition which makes it nugatory. And though the rule was first adopted upon a reasonable ground, to prevent unnecessary delay, it may, if strictly adhered to, contradict the maxim, that a court of equity ought not for form sake to do a great injustice. 1 *Ves.* 247.

Every demurrer must express the several causes of demurrer. *Ord. Canc.* 97. And likewise, in case the demurrer goes not to the whole bill, it must clearly express the particular parts of the bill demurred to. 2 *Ves.* 451. If the demurrer be general to the whole bill, and there is any part, either as to the relief or the discovery, to which the defendant ought to answer, the demurrer, being entire, must be over-ruled. 1 *Ves.* 248. But a defendant may put in separate demurrers to separate and distinct parts of a bill, for separate and distinct causes. For the same ground of demurrer frequently will not apply to different parts of the bill, though the whole is liable to demurrer. And in this case one demurrer may be over-ruled upon argument, and another allowed. 3 *Wms.* 148. A demurrer being always upon matter apparent upon the face of the bill, and not upon matter alledged by the defendant, it sometimes happens that a bill, which, if all the parts of the case were disclosed, would be open to a demurrer, is so artfully drawn, as to avoid shewing upon the face of it any cause of demurrer. In this case the defendant is compelled to resort to a plea, by which he may alledge matter, which, if it appeared on the face of the bill, would be good cause of demurrer. For in most cases, what is a good defence by way of plea, is also good as a demurrer,

demurrer, if the facts appear sufficiently by the bill. *Hettl.* 139. 3 *Atk.* 226.

The most usual bills are such as seek the decree of the court, touching some right claimed by the plaintiff, in opposition to some right claimed by the defendant: The defence to a bill of this nature is consequently, likewise, most usual, and is also, in general, the most extensive. Mere bills of discovery differ little from the first species of bills, except that they pray no relief; for every bill, except a *certiorari* bill, is in fact a bill of discovery. The nature of demurrers in general, and the principal causes of demurrer, may therefore be considered with reference only to the first species of bills, and to bills of discovery merely.

Demurrers to the first species of bills are sometimes both to the discovery sought, and to the relief prayed by the bill, or to part of the discovery and relief: sometimes to the relief only, or part of the relief; and sometimes to the discovery only, or part of the discovery. Sometimes also a demurrer is an advantage taken of some slip, inaccuracy, or mistake in a bill. The several causes of demurrer to the first species of bills may therefore be considered under the following heads. I. Demurrers to the relief prayed by the bill, which frequently include a demurrer to the discovery sought. II. Demurrers to the discovery only, or part of the discovery, which sometimes consequentially affect the relief. III. Demurrers upon some slip, inaccuracy, or mistake in a bill. Under some of these heads, many of the causes of demurrer to bills of discovery merely, will necessarily be treated of: and under a fourth head may be considered the peculiar causes of demurrer to that species of bills.

I. The causes of demurrer to the relief sought by a bill, which will generally include a demurrer to the discovery, are principally these. 1. That plaintiff is incapable, *alone*, of instituting a suit. 2. The want of proper parties to the suit. 3. The want of privity between
between

tween the plaintiff and defendant. 4. The want of proper title in the plaintiff to the thing demanded. 5. That the plaintiff shews an unlawful claim. 6. The want of equity in the plaintiff's case, apparent on the bill. 7. That the plaintiff hath full remedy at law. 8. That the plaintiff hath full remedy in the ecclesiastical court. 9. That the relief prayed by the bill is against a proceeding at law upon a criminal prosecution, or upon a mandatory writ. 10. That the plaintiff ought to have established his right at law before he filed his bill. 11. That the plaintiff demands things of several natures, against several defendants, by the same bill. 12. That the bill is brought for part of a matter only. 13. That the plaintiff shews no claim of interest in the defendant in the thing demanded by the bill. 14. That the bill shews no ground to charge the defendant with the plaintiff's demand.

1. If an infant, or a married woman, an idiot, or a lunatic, exhibiting a bill, appear upon the face of it to be thus incapable of instituting a suit *alone*, and no next friend or committee is named in the bill, the defendant may demur. But if the incapacity does not appear upon the face of the bill, the defendant cannot take advantage of it by way of demurrer. This advantage may be taken, as well in the case of a bill for a discovery merely, as in the case of a bill for relief; for the defendant, in a bill of discovery merely, being always intitled to costs, after a full answer, as a matter of course, would be materially injured, by being compelled to answer a bill exhibited by persons whose property is not in their own disposal, and who are therefore incapable of paying the costs.

2. All persons materially interested in the dispute ought to be parties to the suit, plaintiffs or defendants, however numerous they may be, so that a complete decree may be made between those parties. In some cases, as in the instance of creditors seeking an account of a real and personal estate for payment of their demands, a few suing on behalf of the rest, may substantiate the suit, *Preced.*

in *Chan.* 592. *Gilb.* 230. 2 *Ves.* 312. and the other creditors may come in under the decree. But if a husband sues alone for a legacy given to his wife, 1 *Ch. Ca.* 41. if one joint-tenant sues without the other, *Rep. temp. Finch* 82. if a bill be brought against the heir only, where the personal estate is first liable to answer the plaintiff's demand, 3 *Wms.* 331. 2 *Atk.* 51. and in many other cases, the want of proper parties is a good cause of demurrer. 3 *Wms.* 311. 1 *Atk.* 290. 1 *Eq. Ca. Abr.* 72. 2 *Eq. Ca. Abr.* 165.

If a bill be brought by a lord of a manor against some of the tenants, or by some of the tenants against the lord, upon a question of common, or by a parson for tithes, against some of the parishioners, or by some of the parishioners against the parson to establish a general *modus*, a demurrer will not hold. 1 *Atk.* 283. So if a sufficient reason for not bringing a necessary party before the court is suggested by the bill; as where the party is resident out of the jurisdiction of the court, and that fact is charged, *Preced. in Ch.* 83. 2 *Atk.* 510. or if a personal representative be a necessary party, and the representation is charged to be in litigation in the ecclesiastical court. 2 *Atk.* 51. In all these cases a demurrer will not hold. So too, if the bill seeks a discovery of the parties interested in the matter in question, a demurrer for want of the necessary parties will not hold. 1 *Vern.* 95: A demurrer for want of parties must shew who are the proper parties: not indeed by name, for that might be impossible; but in such manner as to point out to the plaintiff the objection to his bill, and enable him to amend, by adding the proper parties. In the case of a demurrer for want of parties, the court has permitted the plaintiff to amend, when the demurrer has been held good upon argument. 2 *Ch. Ca.* 197.

3. A demurrer may be to a bill for want of privity between the plaintiff and defendant. But a principal has a right to a discovery of his agent's transactions; and therefore if a factor be employed to sell the goods of a merchant,

a merchant, the merchant may file a bill against the persons to whom the goods have been sold, for an account, and to be paid the money for which the goods have been sold, if it be not already paid to the factor: and a demurrer to such a bill has been over-ruled. 2 *Atk.* 394.

4. A demurrer may also be for want of proper title in the plaintiff to the thing demanded, 1 *Vern.* 39. as where persons who had obtained letters of administration in a foreign court, sought an account of personal estate, 3 *Wms.* 371. or where a Protestant, next of kin, claims a rent-charge, settled on a Papist upon her marriage, 2 *Atk.* 210. In the first case, the plaintiffs did not shew a *complete title*; for though they might have a right to administration in the proper ecclesiastical court in *England*, they did not shew that they had obtained it. In the second case, the plaintiff had evidently no right; for the Papist was then incapable of taking by purchase; and therefore the grant of the rent-charge was utterly void. So if a plaintiff claim under a will, and it is apparent, upon the construction of the will, that he has no title, the defendant may demur. 2 *Ves.* 247. *Preced. in Chan.* 580. But if, upon arguing the demurrer, the court is not satisfied, and is desirous the matter should come more fully before the court, the demurrer may be over-ruled, without prejudice to the defendant's insisting on the same matter by way of answer. 2 *Ves.* 247. If the bill does not shew in the plaintiff a title in the thing demanded, he has as little right to a discovery as to relief. Thus if a bill be brought to discover a will, and the plaintiff does not intitle himself as devisee, or heir, or otherwise, *Rep. temp. Finch.* 36. or if a bill be brought for discovery of a personal estate, and the plaintiff does not entitle himself as executor, or administrator, or otherwise, *Rep. temp. Finch.* 44. a demurrer will hold. The case is the same, if a bill be brought by a person having title, but not a perfect title; as by an executor, who does not appear to have proved the will of his testator, 1 *Wms.* 752. or who appears to have proved it in an improper, 3 *Wms.* 371. or in an insufficient

sufficient court, 1 *Wms.* 766. But if the plaintiff shews a compleat title, though a litigated one, or one that may be litigated, as that of an administrator where a suit is depending to revoke the administration, 1 *Vern.* 106. or of an administrator where there may be another personal representative, 3 *Wms.* 370. he has the same right to a discovery as if his title to the thing in demand was not litigated, or doubtful: For in the first case, till the litigation is determined, his title is good; and in the second case, the court will not consider the ecclesiastical court as having done wrong. It has been also determined, that where no will has been proved, nor administration granted, but the matter is *sub judice* in the ecclesiastical court, a demurrer of one of the parties possessed of the personal estate, to a bill for an account filed by the other party, shall be over-ruled: For the ecclesiastical court has no means of securing the effects while the suit there is depending. 1 *Atk.* 286. 2 *Brown. Parl. Ca.* 476. But if a plaintiff has merely a probability of future title, upon an event which may never happen, a demurrer for want of title will hold. 1 *Vern.* 105.

5. If the claim of the plaintiff is of a matter in itself unlawful, as of money promised to a counsellor at law for advice, and pains in carrying on a suit, *Rep. temp. Finch.* 75. or of money bequeathed by a will to purchase a dukedom, 1 *Vern.* 5. the defendant may demur to the bill. This is equally a ground of demurrer to a bill for a discovery merely as to a bill for relief.

6. A want of equity in the plaintiff's case, apparent on the bill, is a sufficient ground for a demurrer, 1 *Vern.* 210. 2 *Ves.* 571. Upon the same ground, if a bill is brought for a discovery of deeds or writings, suggesting, that they are in the custody or power of the defendant, or lost, or any other relief is prayed than the delivery of the deeds or writings, a demurrer will hold, except the plaintiff annexes to his bill an affidavit that the deeds or writings are not in his custody or power, and that he knows not where they are, unless

unless they are in the hands of the defendant; for such a bill does by consequence seek to transfer the jurisdiction from the common law to the court of equity, 2 *Wms.* 541. But if the bill be brought only for discovery and delivery of the deeds, such an affidavit is not necessary, 1 *Vern.* 180. 2 *Wms.* 541. *Nelf. Rep.* 78. or if a bill be brought for discovery of a cancelled deed, and to have another deed executed; for if the plaintiff has the cancelled deed in his hands, he can make no use of it at law. *Mof.* 192.

7. A demurrer to the relief prayed by a bill, for that the plaintiff hath remedy at law, will only hold where the plaintiff can have as effectual and compleat relief at law as in equity. Upon this ground, a demurrer to a bill for recovery of an ancient silver altar, claimed by the plaintiff as treasure-trove within his manor, was over-ruled; for the plaintiff might recover at law the value in an action of trover, or the thing itself, if it could be found, in action of detinue; yet as the defendant might deface it, and thereby depreciate the value, it was held, that the defect of law in that particular ought to be supplied in equity. 3 *Wms.* 390. And although the plaintiff may have remedy at law, yet if it is charged by the bill, that any evidence of the plaintiff's demand is in the defendant's custody, or is lost, the defendant must answer. To such bill, if it seeks relief, the plaintiff must annex an affidavit, that he has not the evidence of the demand in his own power or custody, or the want of the affidavit will be a sufficient cause of demurrer. And if there be no charge in the bill, that the evidence of the demand is not in the plaintiff's custody or power, the demurrer ought to alledge, that there is no such charge in the bill. 3 *Wms.* 395. But whenever the remedy at law is clear and certain, the court will always allow a demurrer. 3 *Atk.* 740. 3 *Brown. Parl. Ca.* 525. A defendant having demurred to a bill, for that the plaintiff had full remedy at law, will not be barred of relief in equity upon another bill, if the plaintiff in the first bill should proceed at law and recover. 3 *Wms.* 397.

8. If a bill be brought for discovery and relief in a matter properly cognizable in the ecclesiastical court, a demurrer will be allowed to the relief, and likewise to the discovery, if the ecclesiastical court is capable of obtaining the discovery. 1 *Atk.* 288. 2 *Ves.* 205, 451. As in case a bill is brought to be relieved against a church rate, and to compel a discovery of the value of the respective real and personal estates of the inhabitants of the parishes in which the rate was assessed, and of the application of the money collected. 1 *Atk.* 288.

9. If a bill be brought for relief against a proceeding at law upon a criminal prosecution, or a mandatory writ, as an indictment, an information, a writ of prohibition, a *mandamus*, or any writ that is mandatory, and not remedial, the defendant may demur. For the court has no jurisdiction; and this being apparent on the face of the bill, the defendant may take advantage of it by demurrer. 2 *Ves.* 398. And though a bill of discovery lies in aid of proceedings in some suits relating to a civil right in a court of common law, as an action; yet such a bill will not lie to aid the prosecution of an indictment or information, or to aid the defence of either. 2 *Ves.* 398.

10. Where one general legal right is claimed against several distinct persons, a bill may be brought to establish that right. 2 *Atk.* 484. But in most cases the plaintiff ought first to establish his right at law. 1 *Atk.* 284. If the right has not the sanction of a long possession, and the plaintiff has any means of trying the matter at law, a demurrer, for that the plaintiff ought to have established his right at law before he brought his bill, will hold. 2 *Atk.* 391. But if the plaintiff has not been actually interrupted or dispossessed, he may bring a bill to examine his witnesses *in perpetuam rei memoriam*, and to establish his right, though he has not recovered in affirmance of it at law; and in such a case, a demurrer has been over-ruled. 1 *Atk.* 284. *Preced. in Ch.* 531. However, as bills of this nature are entertained to prevent multiplicity of suits, by determining the rights

rights upon issues decided by the court, instead of putting the plaintiff to sue a number of persons separately at law, where each suit would only determine the peculiar right in question between the plaintiff and defendant, there is no pretence for such a bill, where a right is disputed between two persons only, until the right has been tried at law. 2 *Atk.* 484. *Preced. in Chan.* 261.

11. The court will not permit a plaintiff to demand by one bill several matters of different natures against several defendants; for this would tend to load each defendant with an unnecessary burthen of costs, by swelling the pleadings with the state of the several claims of the other defendants, with which he has no connection. A demurrer, therefore, for that the plaintiff demands several matters of different natures, of several defendants, by the same bill, will hold. 1 *Vern.* 416. 463. *Hard.* 337. But as the defendants may combine together to defraud the plaintiff of his right, and such a combination is always charged by the bill, the defendant must so far answer the bill as to deny combination. 1 *Vern.* 416. In this, however, the defendant must be cautious; for if the answer goes further than merely to deny combination, it will over-rule the demurrer. 1 *Vern.* 463. A demurrer of this kind will only hold where the plaintiff claims several matters of different natures; for when one general right is claimed by the bill, though the defendants have separate and distinct rights, yet the demurrer will not hold; as if a person claiming a general right to the sole property of a river, files a bill against several persons claiming several rights in the fishery, as lords of manors, occupiers of lands, or otherwise. 1 *Atk.* 282. In this case the plaintiff does not claim several separate and distinct rights, in opposition to several separate and distinct rights claimed by the defendant; but he claims one general and entire right, though set in opposition to a variety of distinct rights claimed by the several defendants.

12. As the court will not permit the plaintiff to demand by one bill several matters, of different natures, against several
veral

veral defendants, so it will not permit a bill to be brought for part of a matter only; but to prevent the splitting of causes, and consequently multiplicity of suits, will allow a demurrer upon this ground. *2 Vern.* 29.

13. The plaintiff must by his bill shew some claim of interest in the defendant in the thing demanded by the bill, or the defendant may demur. *2 Eq. Ca. Abr.* 78. As if a bill be filed to have the benefit of, or to impeach, an award, and the arbitrators are made parties, a demurrer of the arbitrators will hold to the whole bill, as well the relief as the discovery. *2 Vern.* 380. For the plaintiff can have no decree against them, nor can he read their answer against the other defendants. So if a bankrupt be made party to a bill against his assignees touching his estate, he may demur to the relief; for all his interest is transferred to his assignees; but if any discovery is sought of his acts before he became a bankrupt, he must answer to that part of the bill. The plaintiff must likewise shew some claim of interest in the defendant in a bill for a discovery merely, *2 Vern.* 380. *2 Atk.* 394. *1 Ves.* 426. For such a bill can only be a bill to gain evidence, and yet the answer of the defendant cannot be read as evidence against any other person, not even against another defendant to the same bill. *2 Vern.* 380. *3 Wms.* 311. There seems, however, to be an exception to this rule, in the case of a corporation; for as a corporation can answer no otherwise than under their common seal, and therefore, though they answer falsely, there is no remedy against them for perjury; it has been usual, where a discovery of entries, or orders in the books of the corporation, or of any acts done by the corporation, has been necessary, to make their secretary, or book-keeper, or other officer, a party; and a demurrer, for that the bill shewed no claim of interest in the defendant, has been in such case over-ruled. *3 Wms.* 312. So where bills have been filed to impeach deeds on the ground of fraud, attornies who have prepared the deeds, and other persons concerned in obtaining them, have been frequently made defendants,

fendants, as parties to the fraud complained of, for the purpose of obtaining a full discovery; and no case appears in the books of a demurrer by such a party, because he had no claim of interest in the matter in question by the bill. Indeed an attorney, under such circumstances, has been ordered to pay costs. 2 *Atk.* 234.

14. If a bill does not shew some ground to charge the defendant with the plaintiff's demand, the defendant may demur. As where a bill was brought, upon some ground of equity, by the obligee in a bond against the heir of the obligor, alledging that he having assets by descent ought to satisfy the bond; because the bill did not expressly alledge that the heir was bound in the bond, although it alledged that the heir ought to pay the debt, a demurrer to discovery of assets was allowed. 1 *Vern.* 180. So where a bill was brought against an assignee, to discover a matter touching a breach of a covenant in a lease, and the covenant appeared to be collateral, and not running with the land did not bind assigns; or if it did bind assigns, was not stated by the bill so to do; the assignee demurred, and the demurrer was allowed. 1 *Ves.* 56.

But wherever the plaintiff, though not intitled to relief in a court of equity, may yet be intitled to relief in some other court, which cannot compel a discovery upon oath; there, though the defendant may demur to the relief prayed by a bill, he must yet answer to the discovery sought 3 *Wms.* 150. 2 *Atk.* 157.

II. A demurrer to the discovery sought by a bill, sometimes includes, by consequence, a demurrer to the relief, if any is prayed; for without the discovery the plaintiff may not be able to shew his title to relief. The grounds for a demurrer to a discovery only, are principally, 1. That the discovery will make the defendant liable to pains and penalties. 2. That the discovery will make the defendant liable to forfeiture of interest, or something in the nature of a forfeiture. 3. That the discovery cannot be material

to the relief. 4. That the plaintiff shews no title to the discovery.

1. It is a general rule, that no one is bound to answer so as to subject himself to punishment, in whatever manner that punishment arises, or whatever is the nature of the punishment. 2 *Ves.* 245. If therefore a bill requires an answer, which may subject the defendant to any pains, or penalties, he may demur to so much of the bill. As if a bill charges any thing, which, if confessed by the answer, would subject the defendant to any criminal prosecution, 1 *Ves.* 246. 2 *Ves.* 451. or to any particular penalties; as an usurious contract. *Toth.* 135. 1 *Atk.* 450. 2 *Atk.* 395. maintenance. 3 *Wms.* 376. *Rep. temp. Finch* 75. champerty. And in such cases, if the defendant is not obliged to answer the facts, he need not answer the circumstances, though they have not such an immediate tendency to criminate. 1 *Ves.* 247, 248. But if the plaintiff is alone intitled to the penalties, and expressly waives them by his bill, the defendant shall be compelled to make the discovery; for it can no longer subject him to a penalty. As if a rector, or impropriator, or vicar, files a bill for tithes; he may wave the penalty of the treble value, to which he is intitled by the statute of 2 & 3 *Edw.* 6. and thus become intitled to a discovery of the tithes subtracted. 1 *Vern.* 60.

It is not, however, in every case, that the party shall protect himself against relief in a court of equity, upon an allegation that if he answers the bill filed against him, he must subject himself to the consequences of a supposed crime. But though such an allegation will not create a defence against relief, the court will not force the party by his own oath to subject himself to punishment. And therefore in the case of a bill to enquire into a validity of deeds, upon a suggestion of forgery, the court has entertained jurisdiction of the cause; and though it has not obliged the party to a discovery, yet has directed an issue to try whether the deeds were forged. 2 *Ves.* 246.

It

It should seem, that a demurrer will also hold to any discovery, which may tend to shew the defendant guilty of any moral turpitude; as the birth of a child out of wedlock. *See vid. 2 Ves. 451.* But a mother may in some cases be compelled to discover where her child was born, though it may tend to shew the child to be an alien, *2 Ves. 287, 494.* for that is not a discovery of any illegal act, or of any act which can affect the character of the defendant.

2. A demurrer will likewise hold to a bill requiring a discovery, which may subject the defendant to any forfeiture of interest, *Toth. 69.* as if a bill is brought to discover, whether a lease has been assigned without licence; or whether a defendant, intitled during widowhood, *2 Ch. Rep. 68.* or liable to forfeiture of a legacy in case of marriage without consent, *2 Atk. 392. 2 Ves. 265.* is married. But if the plaintiff is alone intitled to the benefit of the forfeiture, and expressly waives it by the bill, *1 Ves. 56.* as in the case of a bill for discovery of waste, *2 Atk. 393.* a demurrer will not hold: for the court has a ground of equity to award an injunction, if the plaintiff sues for the forfeiture, *1 Ves. 56.* And where a devise over of an estate, in case of marriage, is to be considered as a conditional limitation, and not in the nature of a forfeiture, there a demurrer to a bill for a discovery of marriage will not hold. *2 Atk. 393. 3 Atk. 260. 2 Ves. 265.*

A defendant may in the same manner demur to a discovery, which may subject him to any thing in the nature of a forfeiture, *3 Atk. 457.* as where a discovery is sought, whether the defendant was educated in the popish religion, for he incurs the incapacities in the statute 11 and 12 *Will. 3. Comyn 661. 3 Bac. Abr. 800.* [The 18 *Geo. 3.* does not intirely remove these incapacities;] or whether a clergyman was presented to a second living, which avoided the first, *3 Atk. 453.* So a jointress may demur to a bill filed by an heir at law against her for a discovery of her join-

ture deed, if the plaintiff is not capable of confirming, of the bill does not offer to confirm, the jointure, and the facts appear sufficiently on the face of the bill. But in general, advantage is taken of this defence by way of plea. 2 *Ves.* 450.

3. A defendant is not compellable to discover any thing immaterial to the relief prayed by the bill, *Mos.* 38. Upon this ground, upon a bill filed by a mortgagor against a mortgagee to redeem, and seeking a discovery whether the mortgagee was a trustee, a demurrer to the discovery was allowed. For as there was no trust declared upon the mortgage, and the defendant was willing to re-convey, free from incumbrances, it was not material to the plaintiff, whether there was any trust reposed in the defendant or not. *Rep. temp. Finch*, 214. So where a bill was filed by a lord of a borough, praying, amongst other things, a discovery, whether a person applying to be admitted tenant was a trustee, the defendant demurred. 2 *Ves.* 396, 399. And where a bill was brought for a real estate, and sought a discovery of proceedings in the ecclesiastical court upon a grant of administration, the defendant demurred to that discovery, the proceedings in the ecclesiastical court being immaterial to the plaintiff's case, 2 *Atk.* 388. Again, where a bill, to establish an agreement for a separate maintenance for the defendant's wife, prayed a discovery of ill-treatment of the wife to make her recede from the agreement; the defendant demurred to this discovery, as of a matter not properly cognizable or relievable in a court of equity. 1 *Vern.* 204.

4. If a bill seeks a discovery to which the plaintiff shews no title, a defendant may demur to the particular discovery, though not to the rest of the bill. As in the case of a bill filed by a person claiming to be lord of a manor, against another person also claiming to be lord of the same manor, and praying amongst other things a discovery in what manner the defendant derived title to the manor; the defendant demurred, because the plaintiff had
shewn

shewn no title to the discovery, and the demurrer was allowed *.

III. The effect of a demurrer put in upon a slip, inaccuracy, or mistake, in a bill, may be immediately destroyed by amending the bill in the particulars objected to, with leave of the court. Demurrers of this sort are principally where some matter of necessary form has been omitted, as the abode of the plaintiff; or of the next friend of an infant, or a married woman, plaintiff; or of the relator in an information. The mention of the residence of these persons is necessary, that the defendant may know where to resort to serve process, and for his costs, if finally dismissed.

If the plaintiff can avoid any demurrer whatsoever by amendment of his bill, he may obtain leave to amend it at any time before the demurrer has been argued, *Mos.* 301. but after argument of a demurrer to the whole of a bill, it is not usual to permit an amendment, except in the case of a demurrer for want of parties. 2 *Chan. Ca.* 197.

IV. A bill, for a discovery merely, is generally liable to the same grounds of demurrer as any other bill. But a demurrer to a bill for a discovery merely will not hold for want of parties, for the plaintiff seeks no decree, 2 *Eq. Ca. Abr.* 170. nor, in general, for want of equity in the plaintiff's case, for the same reason; nor because the plaintiff may have remedy at law, for he cannot have the discovery which leads to the remedy; nor because the plaintiff may have remedy in the ecclesiastical court, in cases where he cannot have all the necessary discovery in that court; nor because a bill is brought for discovery of part of a matter, for that is merely a demurrer, because the discovery would be insufficient. But it should seem a demurrer would hold to a bill for discovery of several distinct matters, against several distinct defendants. For tho' a defendant is always eventually paid his costs upon a bill of discovery, if both

* *Adderly v. Sparrow*, Hilary 1779.

parties live, yet the court ought not to permit him to be put to any unnecessary expence, as either the plaintiff or defendant may die pending the suit.

Although as the species of bills already considered are the most usual, demurrers to such bills are also most usual, yet demurrers will likewise hold to any other species of bills, except a *certiorari* bill, and generally for the same causes. But some of the different kinds of bills have likewise their own peculiar distinct causes of demurrer.

Thus if to a bill of interpleader the usual affidavit, that the plaintiff does not collude with any of the parties, is not annexed, the defendant may demur. 1 *Ves.* 248. To such a bill there is likewise another cause of demurrer; for if the plaintiff does not shew, that each of the defendants whom he seeks to compel to interplead claims a right, both the defendants may demur; one, because the plaintiff shews no right in the defendant demurring; the other, because the plaintiff, shewing no right in the co-defendant, shews no cause of interpleader. 1 *Ves.* 248. Or if the plaintiff shews no right to compel the defendants to interplead, whatever rights they may claim, each defendant may demur.

To a *certiorari* bill, as has been already observed, there can be no demurrer; for it requires no answer*.

There are few cases in which a man is not intitled to perpetuate the testimony of witnesses, 1 *Atk.* 451. 571. 1 *Wms.* 117. *Preced. in Ch.* 531. 1 *Roll. Abr.* 383. and therefore to such a bill a demurrer will seldom lie. But if upon the face of the bill the plaintiff appears to have no certain right to, or interest in, the matter to which he craves leave to examine, in present, or in future, a demurrer will hold. *Smith. v. Atty. Gen. Mich.* 1777. As if a person not claiming under a will should pray leave to

* There are in the books many cases apparently to the contrary; but they seem not to have been cases of bills praying merely the writ of *certiorari*. See 1 *Chan. Ca.* 31.

perpetuate the testimony of the witnesses to the will; or a person claiming as a devisee in the will or a person living, but a lunatic, should bring a bill to perpetuate the testimony of witnesses to the will, against the presumptive heir at law, 1 *Vern.* 1051. *Eq. Ca. Abr.* 234. * or a person who would be next of kin to a lunatic if he were dead intestate, should bring a bill, in the life-time of the lunatic, to perpetuate the testimony of witnesses to his legitimacy, against the Attorney General as supporting the rights of the Crown †. The parties have, in these cases, no interest in any thing which can be the subject of a suit; they sustain no character under which they can afterwards use the depositions; and therefore the depositions, if taken, would be wholly nugatory. 2 *Pr. Alm. Canc.* 501. But even where a defendant might demur both to the discovery sought and the relief prayed by a bill, it was held, that to so much of the bill as sought to perpetuate the testimony of witnesses the defendant could not demur. 1 *Atk.* 450.

If a bill of revivor does not shew a sufficient ground for reviving the suit, 3 *Wms.* 348. or any part of it, 1 *Eq. Ca. Abr.* 3, 4. either by or against the person, by or against, whom it is brought, the defendant may by demurrer shew cause against the revival. 2 *Ch. Rep.* 244. 3 *Wms.* 348. Indeed though the defendant does not demur, yet if the plaintiff does not shew a title to revive, he will take nothing by his suit at the hearing. 3 *Wms.* 348. A demurrer will hold to a bill of revivor brought singly for costs, 2 *Eq. Ca. Abr.* 3. the court not permitting a suit to be revived for that purpose only, even where the costs have been actually taxed before the abatement happened. If a supplemental bill is brought upon a matter arising before the filing of the original bill, where the suit is in that stage of proceeding that the bill may be amended, the defendant

* 2 *Prax. Alm. Cur. Canc.* 500. where there is the form of such a demurrer.

† *Smith v. Att. Gen. Mich.* 1777.

may demur. 3 *Atk.* 817. If a supplemental bill is brought upon a matter arising subsequent to the time of the filing the original bill, against a person who was no party to the original bill, and claims no interest arising out of the matters in litigation in the original bill, the defendant to the supplemental bill may also demur; especially if the supplemental bill prays, that he may answer the matters charged in the original bill. These, however, are grounds of demurrer arising rather from the plaintiff's having mistaken his remedy, than from his being without remedy. Original bills, in the nature of bills of revivor, and supplement, are liable to objections of the same nature.

A cross bill having nothing in its nature different from the first species of bills, with respect to which demurrers in general have been considered, except that it is occasioned by a former bill, there seems no cause of demurrer to such a bill, which will not equally hold to the first species of bills. And a demurrer for want of equity will not hold to a cross bill filed by a defendant in a suit, against the plaintiff in the same suit, touching the same matter. For being drawn into the court by the plaintiff in the original bill, he may avail himself of the assistance of the court, without being put to shew a ground of equity to support its jurisdiction, a cross bill being generally considered as a defence. *Hard.* 160. 3 *Atk.* 812.

The constant defence to a bill of review for error apparent upon a decree is, by plea of the decree, and demurrer against opening the inrolment. 1 *Vern.* 392. 2 *Atk.* 534. But where any matter beyond the decree is to be offered against opening the inrolment, as length of time, that matter must be pleaded, otherwise the plaintiff will not have the benefit of exceptions, as infancy, coverture, or the like. 2 *Ves.* 109. *Sed Ord.* 1. *Brown. Parl. Ca.* 95. A bill of review upon the discovery of new matter being exhibited only by leave of the court, the ground of the bill is generally well considered before it is brought; and therefore in point of substance it can rarely be liable to a demurrer. But if brought upon new matter alledged, and the

the defendant thinks that matter not relevant, probably he might take the advantage of it by way of demurrer, although the relevancy ought to be considered at the time leave is given to bring the bill. If a supplemental bill in nature of a bill of review, is brought upon allegation of a discovery of new matter, and it appears upon the face of the bill that no new matter has been discovered, the defendant may take advantage of it by demurrer. 2 *Atk.* 40. Bills in the nature of bills of review do not appear subject to any peculiar cause of demurrer, unless the decree sought to be reversed does not affect the interest of the person filing the bill. If upon argument of a demurrer to a bill of review, the demurrer is allowed, and the order allowing it is inrolled, it is an effectual bar to another bill of review 2 *Ch. Ca.* 133. 1 *Vern.* 135. 417. 441. 2 *Vern.* 120. If upon the face of a bill to carry a decree into execution, the plaintiff appears to have no right to the benefit of the decree, the defendant may demur.

A bill filed by the direction of the court, for the purpose of obtaining its decree touching some matter not in issue by the former bill, or not in issue between the proper parties, does not seem liable to any peculiar cause of demurrer. Indeed, being exhibited by order of the court upon hearing another cause, there is little probability, that such a bill should be liable, in substance, to any demurrer.

In addition to the several particular causes of demurrer applicable to particular kinds of bills, it may be observed, that any irregularity in the frame of a bill of any sort may be taken advantage of by demurrer. Thus, if a bill is brought contrary to the usual course of the court, a demurrer will hold. 3 *Atk.* 809. *Bunb.* 56. As where after a decree directing incumbrances to be paid according to priority, the plaintiff, a creditor, obtained an assignment of an old mortgage, and filed a bill to have the advantage it would give him by way of priority over the demands of some of the defendants. 3 *Atk.* 811. 2 *Ves.* 571. This was a bill to vary a decree, and yet was neither a bill of review, nor a

supplemental bill in nature of a bill of review, which are the only kinds of bills which can be brought to affect or alter a decree, unless the decree has been obtained by fraud. 1 Ch. Ca. 44. 2 Freem. 179. 3 Atk. 811. Rep. temp. Talbot 201. So if a supplemental bill is brought against a person not a party to the original bill, praying that he may answer the original bill, and no reason is suggested why he could not be made a party to the original bill by amendment, he may demur. 3 Atk. 817. If an irregularity arises in any alteration of a bill by way of amendment, it may also be taken advantage of by demurrer. As if a plaintiff amends his bill, and states a matter arisen subsequent to the filing of the bill, which consequently ought to be the subject of a supplemental bill, or bill of revivor. 1 Atk. 291.

Words of course preceding a Demurrer.

The demurrer of ——— defendant, to the bill of complaint of complainant.

This defendant by protestation, not confessing or acknowledging all or any of the matters or things in the complainant's bill mentioned to be true in such manner and form as the same are therein and thereby set forth and alledged, doth demur, and for cause of demurrer sheweth, That, &c.

Or thus :

This defendant (as before) therein and thereby set forth and alledged saith, he is advised, That there is no matter or thing in the said bill of complaint contained good and sufficient to call this defendant in question in this honourable court for the same, but that there is good cause of demurrer thereto, for that, &c.

Where the demurrer is to part of the bill or to the relief.

This defendant, &c. in such manner and form as the same are therein set forth as to so much and such part of the said bill

(as prays if to the relief), &c. *this defendant doth demur, and for cause of demurrer sheweth, &c.*

Or thus :

As to so much of the complainant's bill, &c. this defendant by protestation not confessing or acknowledging the complainant's bill to be true, in such sort, manner or form, as the same matters are therein set forth, doth demur, and for cause. &c.

General words of conclusion to demurrers.

Wherefore this defendant doth demur to the said bill of complaint, and to all the matters and things therein contained, and humbly demands the judgment of this honourable court, whether he shall be compelled to make any further or other answer thereto, and humbly prays to be hence dismissed, with his reasonable costs and charges in this behalf most wrongfully sustained.

Or thus:

Wherefore, and for divers other errors and imperfections, this defendant doth demur thereto, and humbly demands, &c.

Where the demurrer is to part only, or to the relief.

Wherefore, and for divers other errors and imperfections appearing in the said bill, this defendant doth demur to so much and such part of the said bill as aforesaid, and humbly prays the judgment of this honourable court, whether he shall be compelled to make any answer to such part of the said bill as is so demurred unto, &c.

Or thus:

And therefore, and for other good causes of demurrer in the said bill contained, as to so much of the said complainant's said bill as is demurred unto as aforesaid, this defendant doth demand the judgment, &c.

Of Pleas.

A PLEA is a special answer to a bill, shewing, or relying upon, one or more things, as a cause why the suit should be either dismissed, delayed, or barred. *Prac. Reg.* 273. The defence proper for a plea must be such as reduces the cause, or some part of it, to a single point, and from thence creates a bar to the suit. The end of a plea is to save to the parties the expence of an examination of witnesses at large; and therefore it is not every good defence in equity that is good as a plea. For where the defence consists of a variety of circumstances, there is no use of a plea; as the examination must still be at large, and the effect of allowing a plea will be, that the court will give judgment on the circumstances of the case before they are made out by proof. 1 *Atk.* 54.

Pleas are of three sorts; I. To the jurisdiction of the court. II. To the person of the plaintiff, or defendant. III. In bar of the plaintiff's suit.—Pleas to the jurisdiction of the court, and to the person of the plaintiff, generally go to the whole bill, and affect both the discovery sought, and the relief, if any, prayed by the bill. These may therefore be considered, without any reference to the peculiar kinds of bills to which they may be applied. But pleas in bar of the suit, though they frequently go to the whole bill, and affect both the relief and discovery, yet sometimes only affect part of both, and sometimes only one, and sometimes the other only, or part only of one, or of the other. It will be therefore necessary to consider pleas of this nature with a reference to the peculiar kinds of bills to which they relate.

I. If the court of *Chancery* has not jurisdiction in the subject matter of the suit, the defendant may plead the matter which deprives the court of jurisdiction, and shew to what court the jurisdiction belongs, and upon this ground may demand the judgment of the court, whether he shall be compelled to answer the bill. 1 *Vez.* 203. Pleas of this nature arise principally where the suit is for land within a county palatine, *Com. Dig. Ch.* 56. *Chan. Ca.* 41. or where the

the defendant claims the privileges of an university, or other particular jurisdiction. *Ca. Rep.* 65, 66, 73. 2 *Ventris*, 362.

The court of *Chancery* being a superior court of general jurisdiction, nothing shall be intended to be out of its jurisdiction, which is not shewn to be so. 1 *Vez.* 204. It is requisite, therefore, in a plea to the jurisdiction of the court, to alledge that the court has not jurisdiction of the subject matter of the suit, and to shew by what means it is deprived of jurisdiction. It is likewise necessary to shew what court has jurisdiction. 1 *Vern.* 59. 1 *Vesf.* 203. If the plea does not properly set forth these particulars, it is bad in point of form. *Nelf. Rep.* 51. 1 *Vesf.* 204. 2 *Ventr.* 362. In point of substance it is necessary, to entitle the particular jurisdiction to exclusive cognizance of the suit, that it should be able to give complete remedy. 2 *Ventr.* 363. 1 *Vern.* 212. A plea therefore, of privilege of the university of *Oxford*, to a bill for a specific performance of an agreement touching lands in *Middlesex*, has been over-ruled: for the university court could not give complete relief. 2 *Ventr.* 363. And if a suit is instituted against different persons, some of whom have privilege, and some not, a plea will not hold. *Ca.* 55, 56. 22 *Vin. Abr.* 9. It is the same case, where one defendant is not amenable to the particular jurisdiction. *Hatton* 59. If, likewise, there is a particular jurisdiction, and yet the parties to litigate any question are both resident within the jurisdiction of the court of *Chancery*; as upon a bill concerning a mortgage of the island of *Sarke*, both mortgagor and mortgagee residing in *England*; the court of *Chancery* will hold jurisdiction of the cause: for a court of Equity agit in personam. 1 *Vesf.* 204. 4 *Inst.* 213. So where the court may not have jurisdiction to give relief, it may yet entertain a bill for a discovery, in aid of the court which can give relief, if the same discovery cannot be there obtained; as if the jurisdiction be in the king in council, where the defendant cannot be compelled to answer upon oath. 1 *Vesf.* 205.

Similar

Similar to a plea to the jurisdiction is the case of a plea to an information charging an undue election of a fellow of a college in one of the universities, that by the statutes the visitor of the college ought to determine all controversies concerning elections of fellows, and that such controversies ought not to be determined elsewhere. 3 Atk. 662. 1 Ves. 78. 464. But the extent of the visitor's authority must be averred; and it must also be averred that he is able to do complete justice. 1 Ves. 474. And where there is a trust created, the visitor having no power to compel performance of the trust, relief must be had in the king's courts of general jurisdiction. 1 Ves. 475.

II. In respect of the person of the plaintiff it may be shewn, either that the plaintiff is by law disabled to sue, as being outlawed, or excommunicated, or a popish recusant convict, which work a temporary disability; or that the plaintiff is attainted in a *præmunire*, or of treason, or felony; or that he is an alien; or that he is incapable alone of instituting a suit. It may also be pleaded that the plaintiff, or defendant, is not such person as alledged in the bill; as feme sole, heir, executor, or administrator; and is not therefore to sue or be sued as such for the matter in question. *Prac. Reg.* 276. The three first of these pleas are generally to the person of the plaintiff suing in his own right; the three next may be to the person of the plaintiff suing in any right; and the last to the person either of the plaintiff, or defendant, in whatever right suing, or sued.

I. If outlawry is pleaded, the record, or the *capias* thereupon, must be pleaded *sub pede sigilli*, and is usually annexed to the plea. *Toib.* 54. *Prac. Reg.* 276. A plea of outlawry, in a suit for the same duty or thing for which relief is sought by the bill, is insufficient, according to the rule of law, and shall be disallowed of course, as put in for delay. Otherwise a plea of outlawry is always a good plea, so long as the outlawry remains in force. *Ord. Canc.* 97. But a plea of this nature is no longer a bar than whilst the outlawry remains

in force. If that is reversed, the plaintiff, upon payment of costs, may sue out fresh process against the defendant, and compel him to answer the bill. *Ord. Canc.* 97. Outlawry in a plaintiff, executor, or administrator, cannot be pleaded; for he sues *in auter droit*. 1 *Vern.* 184. *Prac. Reg.* 277. It is equally insufficient, if alledged in disability of a person named in a bill as the next friend of an infant plaintiff, or in an information as a relator *.

2. The defendant may plead that the plaintiff is excommunicated, which must be certified by the ordinary, either by letters patent containing a positive affirmation that the plaintiff stands excommunicated, and for what; or by letters testimonial, reciting, "*quod scrutatis registeriis invenitur, &c.*" Either of these certificates must be *sub sigillo*, and so pleaded. *Prac. Reg.* 278. *Toth.* 54. Excommunication is a good plea to an executor, or administrator, though they sue *in auter droit*, *Co. Lit.* 134. 4 *Bac. Abr.* 36. but not to the next friend of an infant. *Prac. Reg.* 278. This, like the plea of outlawry, ceases to be a bar when the disability is removed; and therefore the plaintiff, purchasing letters of absolution, may, as at law, sue out fresh process, and compel the defendant to answer the bill.

3. By statute 3 *Jac. I. c. 5. § 11.* every popish recusant convict is in many cases disabled to sue, in the same manner as a person excommunicated. The instances of a plea of conviction of recusancy have probably been rare, as no traces of any occur in the books of reports, nor does the form of the pleas appear in the books of practice. If advantage was attempted to be taken of this statute, the court would probably require the same averments to support the plea as are necessary to a plea of the same nature at law.

* There is a case in *Prec. in Ch.* 13. where a plea of outlawry, in disability of the person of a relator, is said to have been allowed in the duchy court of Lancaster. But the relator seems to have sustained the character of plaintiff, as well as of relator.

3 *Bac. Abr.* 780. This plea also ceases to be a bar, if the plaintiff, by conforming, removes the disability.

4. A plea, that the plaintiff is disabled from suing, being attainted, is equally rare. It would probably be likewise judged with the same strictness as if it was a plea at law. 2 *Atk.* 399.

5. There is little more to be found in the books upon the subject of a plea that the plaintiff is an alien. 2 *Atk.* 399. 2 *Vin. Abr.* 274. *Prac. Reg.* 278. An alien, who is not an alien enemy, is under no disability of suing for any personal demand, 1 *Atk.* 51. and an alien enemy may sue under some circumstances. 3 *Burr.* 1741. 1 *Bac. Abr.* 84. A plea has been put in to a bill filed by an alien infidel, not of the Christian faith, and was attempted to be supported upon the ground, that the plaintiff was upon a cross bill incapable of being examined upon oath. The plea was over-ruled without argument. 1 *Atk.* 51.

6. If a bill is filed in the name of any person incapable *alone* of instituting a suit; as an infant, a married woman, or an idiot or lunatic so found by inquisition; the defendant may plead the infancy, the coverture, or the inquisition of idiocy or lunacy, in bar of the suit. *Prac. Reg.* 276.

7. A plea that the plaintiff is not such person as alledged in the bill, though a negative plea, is good in abatement of the suit; as where a plaintiff intitles himself as administrator, and the defendant pleads that he is not administrator. 1 *Vern.* 473. So where a person intitling himself as administrator of an intestate files a bill, and the defendant pleads that the supposed intestate is still living. A plea, that the defendant is not such person as alledged in the bill, is also mentioned in the books of practice as a plea which may be supported. *Prac. Reg.* 276. It seems to have been considered as more convenient for a person, sued in a character which he does not sustain, to put in an answer, alledging the mistake in the bill, and praying the judgment of the court, whether he should be compelled farther to answer the bill. *Ca. Rep.* 61. *Prac. Reg.* 278. But this in fact amounts to a plea.

III. A plea in bar is commonly where some foreign matter is alledged, whereby, supposing the bill, so far as it is not contradicted by the plea, to be true, yet the suit, or some part thereof, is barred. 2 *Atk.* 51. *Prac. Reg.* 279. Where there are matters alledged in the bill to which the bar does not reach, or there is some circumstance relating to the matter in bar, and charged in the bill, which requires a particular answer, as suggestions of fraud, the defendant must, to such points, answer upon oath. *Prac. Reg.* 280. The answer, in this case, must be full to the charges in the bill, and sufficient to support the plea. 3 *Atk.* 303. For the matters so charged will be intended against the pleader, unless they are fully denied by the answer.

Pleas in bar will be first considered with reference only to the first species of bills, and to bills of discovery merely; and will be afterwards treated of as applied to the several other species of bills. They may be ranked under the heads of, I. Pleas of matters recorded, or as of record in the court itself, or some other court of Equity; II. Pleas of matters *in pais*; and III. Pleas of matters of record, or matters in the nature of matters of record, in some court, not being a court of Equity, either alone, or joined with matters *in pais*.

I. Pleas in bar of matters recorded, or as of record, in the court itself, or some other court of equity, may be, 1. a decree or order of the court, by which the rights of the parties are already determined, 3 *Atk.* 626. or another bill for the same cause dismissed, 1 *Vern.* 310. 2. another suit depending in the court, or in another court of Equity, between the same parties, for the same cause. 3 *Atk.* 587. 590. Pleas of this nature generally go both to the discovery sought, and the relief prayed, by the bill.

1. A decree, determining the rights of the parties, and signed and inrolled, may be pleaded to a new bill for the same matter; and this even if the party bringing the new bill

bill was an infant at the time of the former decree. For a decree inrolled can only be altered upon a bill of review. 3 *Atk.* 626. But the decree must be in its nature final, or afterwards made so by order, or it will not be a bar. Therefore a decree, for an account of principal and interest due on a mortgage, and for a foreclosure in case of nonpayment, cannot be pleaded to a bill to redeem, unless there is a final order of foreclosure. 2 *Ves.* 450. Nor can a decree, unless cause, by default, be pleaded, without the order to make the decree absolute. Upon a plea of this nature so much of the former bill and answer must be set forth, as is necessary to shew that the same point was then in issue. 2 *Atk.* 603. 2 *Ves.* 577. decree, dismissing a former bill for the same matter, may be pleaded in bar, if the dismissal was not, in terms, directed to be without prejudice, 1 *Vern.* 110. 1 *Brown. Parl. Cas.* 281. 1 *Chan. Ca.* 155. The decree must be signed and inrolled, or it cannot be pleaded in bar of another suit, though it may be insisted upon by way of answer, 3 *Atk.* 809. 2 *Ves.* 577. But though it cannot be pleaded directly in bar of the suit for want of inrolment, it might perhaps, be pleaded to shew, that the bill was exhibited contrary to the usual course of the court, and ought not therefore to be proceeded upon. For if the decree appeared upon the face of the bill, the defendant might demur, 3 *Atk.* 809. *Bunb.* 56. 2 *Ves.* 571. a decree not signed and inrolled being to be altered only upon a re-hearing, 2 *Ves.* 598. as a decree signed and inrolled can be altered only upon a bill of review, 1 *Ch. Ca.* 44. 2 *Freem.* 179. An order of dismissal is a bar only where the court determined that the plaintiff had no title to the relief sought by his bill; and therefore an order dismissing a bill for want of prosecution is not a bar to another bill, 1 *Atk.* 571.

2. A plea of another suit depending in the same or another court of equity, for the same cause, must aver that there have been proceedings in the suit; as appearance, or process requiring appearance at the least, 1 *Eq. Ca. Abr.*

39. It seems likewise regular to aver that the suit is still depending, 3 *Atk.* 589. though, as a plea of this nature is not usually argued, but, being clearly a good plea, if true, is referred to the examination and enquiry of one of the masters of the court as to the fact, it has been held, that a positive averment that the former suit depending is not necessary. *Ord. Canc.* 98. For the same reason a plea of this kind is not put in upon oath. 1 *Vern.* 332. It is not necessary to the sufficiency of a plea of this nature, that the former suit should be precisely between the same parties as the latter. For if a man institutes a suit, and afterwards sells part of the property in question to another, who files an original bill touching the part so purchased by him, a plea of the former suit depending touching the whole property will hold. 1 *Eq. Ca. Abr.* 39. So where one part-owner of a ship filed a bill against the husband for an account, and afterwards the same part-owner, and the rest of the owners, filed a bill for the same purpose, the pendency of the first suit was held a good plea to the last. For though the first bill was insufficient for want of parties, yet by the second bill the plaintiff was doubly vexed for the same cause. The course of the court in such a case seems to be, to dismiss the first bill, and to direct the defendant in the second cause to answer, upon being paid the costs of the plea allowed. 1 *Chan. Ca.* 241. Where a second bill is brought by the same person for the same purpose, but in a different right; as where the executor of an administrator brought a bill, conceiving himself to be the personal representative of the intestate, and afterwards procured administration *de bonis non*, and brought another bill, 2 *Atk.* 44. the pendency of the former bill is not a good plea. The reason of this determination seems to have been, that the first bill being wholly irregular, the plaintiff could have no benefit from it, and it might have been dismissed upon demurrer. Where a decree is made upon a bill brought by a creditor, on behalf of himself and all other creditors of the same person, and another creditor comes in before the master to

take the benefit of the decree, and proves his debt, and then files a bill on behalf of himself and the other creditors, the defendants may plead the pendency of the other suit; for a man coming in under a decree is *quasi* a party.

3 *Atk.* 557. The proper way for a creditor in such a situation to proceed, if the plaintiff in the original suit is dilatory, is by application to the court for liberty to conduct the cause. If a plaintiff sues a defendant, at the same time, for the same cause, at common law and in equity, the defendant, after answer put in, must apply to the court that the plaintiff may make his election where he will proceed, and cannot plead the pendency of the suit at common law in bar of the suit in equity, though the practice was formerly otherwise. 3 *Wms.* 90. *Ord. Cant.* 99.

II. Pleas in bar, of matters *in pais* only, sometimes go both to the discovery sought, and to the relief prayed, by the bill, or by some part of it; sometimes only to the discovery, or part of the discovery; and sometimes only to the relief, or part of the relief.

Pleas of this nature which may go both to the discovery and relief sought by the bill, or by some part thereof, but which sometimes extend no farther than the relief, are principally, 1. a want of title in the plaintiff; 2. a want of proper parties to the suit; 3. a stated account; 4. an award; 5. a release; 6. a will; 7. a purchase, mortgage, or settlement, for a valuable consideration, without notice of the plaintiff's claim.

1. A plea may be of want of title in the plaintiff, by reason of a disability either in him or in the person under whom he claims. As if a plaintiff claims as purchaser, and the defendant pleads that he was a papist, and incapable of taking by purchase *; or a plaintiff claims a real or personal estate accrued previous to conviction, either of

* See, however, 18 *Geo.* 3. c. 60. by which this incapacity is, under certain conditions, removed.

himself or of the person under whom he claims, of some offence which occasioned a forfeiture; or previous to a bankruptcy; or any other want of title in the plaintiff to the matter claimed by the bill. 2 *Atk.* 399. *Gilb.* 228. A plea of conviction of any offence which occasions forfeiture, as manslaughter, must be pleaded with equal strictness as a plea of the same nature at common law. 2 *Atk.* 399. Pleas of want of title in the plaintiff generally extend to the discovery sought by the bill, as well as to the relief prayed. 2 *Atk.* 299.

2. If a want of proper parties is not apparent on the bill, a defendant may plead it; and a plea of this nature goes both to the discovery and the relief. 1 *Vern.* 110. 2 *Atk.* 51. But where a sufficient reason is suggested by the bill for not making the necessary party; as where a personal representative is a necessary party, and the bill states that the representation is in contest in the ecclesiastical court, 2 *Atk.* 51. or where a necessary party is resident abroad, out of the jurisdiction of the court, and the bill charges that fact, *Preced. in Ch.* 83. 2 *Atk.* 510. or where the bill seeks a discovery of the necessary parties, 1 *Vern.* 95. a plea for want of parties will not be allowed. A plea for want of parties to a bill for a discovery merely will not hold; for the plaintiff in that case seeks no decree. 2 *Eq. Ca. Abr.* 170.

3. A plea of a stated account is a good bar to a bill for an account. 1 *Vern.* 180. 2 *Atk.* 1. It must shew that the account was in writing, and the balance in writing; or at least it must set forth the balance. 2 *Atk.* 399. If the bill charges that the plaintiff has no counterpart of the account, the account should be annexed by way of schedule to the answer, that if there are any errors upon the face of it, the plaintiff may have an opportunity of pointing them out. 3 *Atk.* 303. If error or fraud are charged, they must be denied by the plea, as well as by way of answer, *Gilb. Ch.* 56. and if neither error nor fraud are charged, the defendant must by the plea aver that the stated ac-

count is just and true, to the best of his knowledge and belief. 3 *Atk.* 70. The delivery up of vouchers at the time the account was stated seems to be a proper averment in a plea of this nature, if the fact was such. *Gilb. Ch.* 57.

4. An award may be pleaded to a bill to set aside the award, and open the account, 2 *Atk.* 395, 501. and it is not only good to the merits of the case, but likewise to the discovery sought by the bill. 3 *Atk.* 529, 644. But if fraud, or partiality, are charged against the arbitrators, those charges must not only be denied by way of averment in the plea, but the plea must be supported by an answer shewing the arbitrators to have been incorrupt and impartial. 2 *Atk.* 396, 501.

5. In a plea of a release, the defendant must set out the consideration upon which the release was made. 2 *Ves.* 108. *Hard.* 168. If a release is pleaded to a bill for an account, it must be under seal; otherwise it must be pleaded as a stated account only. *Gilb. Ch.* 57.

6. To a bill brought, upon some ground of equity, by an heir at law against a devisee, to turn the devisee out of possession, the devisee may plead the will, and that it was duly executed, and ought to prevail, until upon an issue at law it should be found to be otherwise. 3 *Atk.* 17. 2 *Ves.* 361. But if the bill prays a receiver, and the plea goes to that part of the bill, it will be so far over-ruled; as it may be necessary for the court in the progress of the cause to appoint a receiver. 3 *Atk.* 17. *sed vide* 361.

7. A plea of purchase for a valuable consideration, or of a mortgage without notice of the plaintiff's title, is a bar to a suit in equity. 2 *Atk.* 397, 630. 2 *Ventr.* 361. Such a plea must aver, that the person who conveyed, or mortgaged, to the defendant, was seised in fee, or pretended to be seised, and was in possession, if the conveyance purported an immediate transfer of the possession, at the time when he executed the purchase or mortgage deed. 3 *Wms.* 281. 1 *Vern.* 246. It must aver a conveyance, and not articles

articles merely, 3 *Wms.* 281. for if there are articles only, and the defendant is injured, he must sue at law upon the covenants in the articles. 1 *Atk.* 571. It must aver the consideration, and the actual payment of it; for if it is only secured to be paid it is not sufficient. 3 *Atk.* 304, 814. The plea must also deny notice of the plaintiff's title, or claim, previous to the execution of the deeds, and payment of the consideration, 1 *Vern.* 179. 1 *Ch. Ca.* 34. 2 *Atk.* 631. 3 *Atk.* 304. and the notice so denied must be notice of the existence of the plaintiff's title, and not merely notice of the existence of a person who could claim under that title. 1 *Atk.* 522. If particular instances of notice or circumstances of fraud are charged, they must be denied as specially and particularly as charged in the bill, 3 *Atk.* 815. 2 *Ves.* 450. This special and particular denial, of notice or fraud, must be by way of answer, that the plaintiff may be at liberty to except to its sufficiency. 1 *Vern.* 185. But notice, and fraud, must also be denied, generally, by way of averment in the plea; otherwise the fact of notice, or of fraud, will not be in issue. 3 *Wms.* 95. *Gillb. Ch.* 58. 3 *Wms.* 244. * Notice, or fraud, thus put in issue, if proved, will effectually open the plea on the hearing of the cause. A purchaser with notice, of a purchaser without notice, may shelter himself under the first purchaser. *Prec. in Ch.* 51. 1 *Atk.* 571. 2 *Atk.* 139, 242. But notice to an agent is notice to the principal, 2 *Vern.* 574. and where a person, having notice, purchased in the name of another who had no notice, and knew nothing of the purchase, but afterwards approved

* In the case of *Meadows v. Dukes of Kingston*, *Mieb.* 1777, the Chancellor seemed to be of opinion, that notice, and fraud, were to be denied by way of averment in the plea, in cases only where the denial made part of an equitable defence; as in a plea of purchase for valuable consideration, the denial of notice must be by way of averment in the plea, because the want of notice creates the equitable bar.

it, and without notice paid the purchase-money, and procured a conveyance; the person first contracting was considered from the beginning as the agent of the actual purchaser, who was therefore held affected with notice. 1 *Brown. Parl. Ca.* 244. A settlement in consideration of marriage is equivalent to a purchase for a valuable consideration, and may be pleaded in the same manner. *Rep. temp. Finch*, 9. If a settlement is made after marriage, in pursuance of an agreement before marriage, the agreement, as well as the settlement, must be shewn, 1 *Vern.* 139. A widow, defendant to a suit brought by any person claiming under her husband, to discover what lands she is in possession of, and what is her title, may plead her settlement in bar to any discovery, unless the plaintiff offers, and is able, to confirm her jointure. 2 *Ves.* 450. But a plea of this nature must set forth the settlement, and the lands comprized in it, with sufficient certainty. 1 *Atk.* 52. A plea of purchase for a valuable consideration protects a defendant from giving any answer to a title set up by the plaintiff; but a plea of bare title only, without setting forth any consideration, is not sufficient for that purpose. 2 *Atk.* 241. Upon a plea of purchase for a valuable consideration, to a discovery of deeds and writings, the purchase deed must be excepted; for it is pleaded. 2 *Ves.* 107.

Upon a similar ground, if a bill is filed for discovery of goods purchased of a bankrupt, the defendant may plead that he purchased them *bona fide*, for a valuable consideration, paid before the commission of bankrupt was sued out, and before he had any notice of the bankruptcy. 2 *Ch. Ca.* 72, 73. 1 *Vern.* 27.

Pleas in bar, of matters *in pais* only, which extend no farther than the discovery sought by the bill, or by some part thereof, may be, 1. that the discovery may subject the defendant to pains and penalties; 2. that it may subject him to a forfeiture, or something in the nature of a forfeiture; 3. that it would betray the confidence reposed in a counsel, attorney, or arbitrator. And any other matter

matter which may shew that the defendant ought not to be compelled to make the discovery sought, for similar reasons, may be pleaded in like manner.

1. It has been already observed, that no person is bound to answer so as to subject himself to punishment, in whatever manner that punishment arises, or whatever is the nature of the punishment, 2 *Ves.* 245. 1 *Vern.* 109. If, therefore, a bill requires an answer which may subject the defendant to any pains or penalties, or tend to accuse him of any crime, and this is not so apparent upon the face of the bill that the defendant can demur, he may by plea set forth by what means he may be liable to punishment, and insist he is not bound to answer the bill, or so much thereof as the plea will cover. 1 *Vern.* 110. Thus if a bill is brought for discovery of a marriage, where the fact, if true, may subject the party to punishment in the ecclesiastical court for incest, the defendant may plead the matters to shew that the marriage, if real, was incestuous, and would subject the parties to pains and penalties. 2 *Ves.* 243. But if the discovery sought is not of a fact which can subject the defendant to any penalty, though connected with some other fact which may, as where a question is, whether the defendant has a legitimate son; the defendant is bound to answer. For the discovery of that fact cannot subject him to a penalty, though the discovery of his marriage with the mother of the son may; and therefore he shall not be compelled to discover the marriage. 2 *Ves.* 493.

2. It has been also already observed, that no person is bound to answer so as to subject himself to any forfeiture, or to any thing in the nature of a forfeiture. 1 *Atk.* 526.

If this is not apparent on the bill, the defence must be made by way of plea. But such a plea will only bar the discovery of the fact which would occasion a forfeiture. Therefore, where a tenant for life pleaded to a bill for discovery whether he was tenant for life or not, that he had made a lease for the life of another, which, if he was tenant for his own life only, might occasion a forfeiture,

the plea was over-ruled. 2 *Ves.* 108. So upon a bill charging the defendant to be tenant for life, and that he had committed waste, he may plead to the discovery of the act which would occasion the forfeiture, the waste; but he cannot plead to the discovery whether he was tenant for life, or not. 2 *Ves.* 109. So upon a bill to discover whether the defendant was an alien, and whether her child was an alien, and where born, it was held the defendant was not bound to discover whether she was herself an alien, but she was compelled to discover whether her child was an alien, and where born. In all cases of forfeiture, if the plaintiff is intitled alone to the benefit of the forfeiture, *Mos.* 75. and waives it by his bill, the defendant will be compelled to make the discovery required. And though the plaintiff is not intitled to the benefit of the forfeiture, yet if the defendant has by his own agreement bound himself not to insist on being protected from making the discovery, the court will compel him to make it. *Mos.* 77.

3. If a bill seeks a discovery of a fact from one whose knowledge of the fact was derived from the confidence reposed in him as a counsel, an attorney, or an arbitrator, he may plead, in bar of the discovery, that his knowledge of the fact was so obtained. 1 *Chan. Ca.* 277.

III. Pleas in bar, of matters of record, or of matters in the nature of matters of record, in some court not being a court of equity, either alone, or joined with matters *in pais*, likewise extend sometimes both to the discovery, and the relief, sought by the bill, or by some part thereof; sometimes only to the discovery, or part of the discovery; and sometimes only to the relief, or part of the relief.

Pleas of this nature may be, 1. a fine, and non-claim; 2. a recovery, and the deed to lead, or declare, the uses thereof; 3. a judgment at law, or sentence of some other court; 4. some statute; as the statute of frauds, and perjuries; the statute of limitations; or any other statute which is a bar to the demands of the plaintiff.

1. A plea of a fine and non-claim, though a legal bar, yet is equally good in equity, provided it is pleaded with proper averments, *W. Jones*, 416. 1 *Ch. Ca.* 278. 2 *Atk.* 631. 3 *Atk.* 303. Where a title is merely legal, though the defect is apparent upon the face of the deeds, yet the fine will be a bar in equity, and a purchaser will not be affected with notice, so as to make him a trustee for the person who had the right. For a defect upon the face of title deeds, is often the occasion of a fine being levied. 2 *Atk.* 631. And even a fine levied upon bare possession, with non-claim, may be a bar in equity, if a legal bar, though with notice at the time the fine was levied. 2 *Atk.* 240. But with respect to equitable titles, there is a distinction. For where the equity charges the land only, the fine bars. But where it charges the person only, in respect of the land, it does not bar. 1 *Ch. Ca.* 278. 2 *Atk.* 390. Therefore if a man purchases from a trustee, and levies a fine, he stands in the place of the feller, and is as much a trustee as the feller was, 2 *Atk.* 631. provided he has notice of the trust, or is a purchaser without consideration. *Gillb. Ch.* 62. So if the grantee of a mortgagee levies a fine, that will not discharge the equity of redemption. 2 *Atk.* 631. 2 *Freem.* 21. 96. *contr.* But there are cases, both of legal and equitable titles, in which a fine and non-claim will bar, notwithstanding notice at the time of levying the fine. 2 *Atk.* 361. 3 *Atk.* 303. 560. If a fine is levied where the legal estate is in trustees for an infant, and the trustees neglect to claim, the infant, claiming by bill within five years after he attains twenty-one, shall not be barred. 2 *Vern.* 368. But, perhaps, this should be understood as referring to the case of a fine levied with notice of the title of the infant. 3 *Wms.* 309. Where a title to lands is merely equitable, as in the case of an agreement to settle lands to particular uses, claim to avoid the fine must be by *subpœna*. 1 *Ch. Ca.* 278. 2 *Freem.* 21. The pendency of a suit in equity will, therefore, in equity, prevent the running of a fine. 2 *Atk.* 389, 90. Upon the whole, wherever a person comes in
by

by a title opposite to the title to a trust estate; or comes in under the title to the trust estate, for a valuable consideration, without fraud, or notice of fraud, or of the trust; a fine and non-claim may be set up as a bar to a claim of a trust. *Gilb. Ch.* 63. When a fine and non-claim are set up as a bar to a claim of a trust, by a person claiming under the same title, it is not sufficient to aver, that, at the time the fine was levied, the seller of the estate, being seised, or pretending to be seised, conveyed; but it is necessary to aver, that the seller was actually seised. It is not, indeed, requisite to aver, that the seller was seised in fee; an averment that he was seised *ut de libero tenemento*, and being so seised, a fine was levied, will be sufficient. *2 Atk.* 630. A fine and non-claim may be pleaded in bar to a bill of review. *2 Vern.* 190.

2. To a claim under an entail, a recovery duly suffered, with the deed to lead the uses of that recovery, may be pleaded; if the estate limited to the plaintiff, or under which he claims, is thereby destroyed.

3. To a bill to set aside a judgment, as obtained against conscience, the defendant may plead the verdict, and judgment, in bar. *3 Atk.* 223. But if there is any charge of fraud, or any circumstance shewn as a ground for relief, the judgment cannot be pleaded, unless the fraud, or other circumstance, the ground upon which the judgment is sought to be impeached, be denied, and thus put in issue by the plea. A sentence in a foreign court may be a proper defence by way of plea; but the court pronouncing the sentence must at least have full jurisdiction to determine the rights of the parties. *3 Atk.* 215. Upon the same ground, plea of a will and probate in the proper ecclesiastical court, is a good plea to a bill by persons claiming as next of kin of a person supposed to have died intestate. *1 Vern.* 397. Even if fraud in obtaining the will is charged, that is not a sufficient equitable ground to impeach the probate; for the parties may resort to the ecclesiastical court, which is

competent to determine of the fraud*. But where the fraud practised has not gone to the whole will, but only to some particular clause; or if the fraud has been practised to obtain the consent of the next of kin to the probate; the courts of equity have laid hold of these circumstances to declare the executor a trustee for the next of kin. 1 *Str.* 666. *Gilb.* 203. 1 *Ves.* 284. Where there are no such circumstances, the probate of the will is a clear bar to a demand of personal estate; and if the testator died in a foreign country, and left no goods in any other country, probate of the will according to the law of that country is sufficient. 1 *Vern.* 397.

4. To a bill for discovery of a trust, the statute of frauds and perjuries, with an averment that there was no declaration of trust in writing, may be pleaded. 2 *Atk.* 156. The same statute, with an averment that a will was not duly executed as required by the statute, is a good plea to a bill brought by a devisee, claiming under the will. To a bill for a specific performance of an agreement, the same statute, with an averment that there was no agreement in writing, signed by the parties, may be pleaded. *Proc. in Ch.* 402, 533. But in all these cases, if any matter is charged by the bill which may avoid the bar created by the statute, that matter must be denied, generally, by way of averment in the plea; and it must be denied, particularly, and precisely, by way of answer to support the plea. The statute of limitations is likewise a good plea. 3 *Wms.* 309. 2 *Atk.* 395. *Gilb. Ch.* 61. But if a bill charges a fraud, and that the fraud was not discovered till within six years before filing the bill, the statute is not a good plea, unless the defendant denies the fraud, or avers that the fraud, if any, was discovered six years before filing the bill. 3 *Wms.* 143. And though the statute of limitations is a bar to the

* 2 *Vern.* 8. 76. 2 *Ch. Ca.* 178. 1 *P. Wms.* 389. 2 *P. Wms.* 286. *Meadows v. Dutcheff of Kingston, Michelm.* 1777. claim

claim of a debt, it is not to a discovery when the debt became due; for if that is set forth, it will appear to the court whether the time limited by the statute is elapsed. 2 *Atk.* 51. Where a particular special promise is charged to avoid the operation of the statute, the plaintiff must deny the promise charged by averment in the plea, as well as by answer to support the plea. 3 *Atk.* 70. Where the demand is of any thing executory, as a note for payment of an annuity, or of money at a distant period, or by instalments, the defendant must aver that the cause of action hath not accrued within six years; because the statute bars only as to what was actually due six years before the action brought. 3 *Atk.* 71. Upon a bill for discovery of a title, charging fraud, and praying possession, the statute of limitations alone is not a good plea to the discovery; for the defendant must answer to the charge of fraud. 3 *Atk.* 558. The statute of limitations may be pleaded to a bill to redeem a mortgage, if the mortgagee has been in possession twenty years, 3 *Atk.* 225 and indeed a demurrer has been allowed in this case, where the possession has appeared upon the face of the bill, though later cases seem to be to the contrary. 3 *Wms.* 287. 3 *Atk.* 225. To a bill, on an equitable title to presentation to a living, seeking to compel the defendant to resign, plenarty for six months before the bill was filed may be pleaded in bar; the statute of *Westminster 2.* being considered for this purpose as a statute of limitation, in bar of an equitable, as well as of a legal right. 2 *Wms.* 404. 3 *Atk.* 459. But if a *quare impedit* is brought before the six months are expired, though the bill is filed after, it may be in some cases a ground for the court to interfere, and consequently the plenarty would not in such cases be pleadable in bar. 2 *Wms.* 405.

In the same manner, any other statute, which may be a bar to the demands of the plaintiff, may be pleaded, with the averments necessary to bring the case of the defendant within the statute, and to avoid any equity which may be set up against the bar created by the statute. And

if

if a discovery is sought which may subject the defendant to the penalties of any statute, he may plead that statute in bar of the discovery. Thus where a bill sought a discovery, whether the defendant had become a purchaser of an estate, of which the supposed seller was not in possession, the defendant pleaded the statute of 32 Hen. VIII. c. 9. against selling, or contracting to sell, any pretended rights or titles. 3 *Wms.* 375. So where a bill was brought by insurers, for a discovery of what goods had been shipped on board a vessel, the defendant pleaded the statutes which make it penal to export wool. He was however directed to answer so far as to discover what goods were on board the vessel besides wool. 1 *Atk.* 53. In the same manner, statutes which occasion forfeitures, or any thing in the nature of a forfeiture, may be pleaded. Thus to a bill, seeking a discovery, whether a person under whom the defendant claimed, was a papist, the defendant pleaded his title, and the statute of 11 and 12 Will. III. disabling papists. 1 *Atk.* 526. 528. 2 *Ves.* 389.

Pleas in bar have been hitherto considered with reference only to the two kinds of bills most common in practice. The same grounds of plea will likewise hold in many cases to the several other kinds of bills, according to their respective natures, except to a certiorari bill, *sed vide* 3 *Ch. Rep.* 66. where a plea, to a certiorari bill, of a decree in the inferior court, is mentioned. But some of the other kinds of bills admit of a peculiar defence by way of plea.

Thus a bill of interpleader, if the plaintiff, or either of the defendants, has no right, both of the defendants in the first case, and the defendant having right in the second, may plead the matter necessary to shew that the plaintiff, or the other defendant, has no right; and, consequently, either that there is no subject of interpleader, or that the plaintiff has no right to compel the defendants to interplead.

To a bill to perpetuate the testimony of witnesses, the defendant may plead any thing which shews that the plain-
tiff

tiff has no interest in the matter to which he prays liberty to examine, or that the defendant has an equal title to the protection of a court of equity. As if a bill is brought to perpetuate the testimony of witnesses to a will, and the defendant pleads a subsequent will, or that he is a purchaser for a valuable consideration without notice of the will, 1 *Vern.* 354. or that the matter, to which the plaintiff prays leave to examine his witnesses, is capable of being immediately tried at law, and that the plaintiff has not established his right at law. 1 *Vern.* 308. 312.

If a bill of revivor is brought, without sufficient cause to revive the suit against the defendant, and this is not apparent on the bill, the defendant may plead the matter necessary to shew that the plaintiff is not intitled to revive the suit against him. 3 *Wms.* 348. Or if the plaintiff is not intitled to revive the suit at all, though a title is stated in the bill, so that the defendant cannot demur, the objection to the plaintiff's title may also be taken by way of plea. If a supplemental bill is brought upon matter which arose before the original bill was filled, and this is not apparent on the bill, the defendant may plead that fact. Bills in the nature of bills of revivor and supplement are liable to the same pleas.

A cross bill differing in nothing from the first species of bills, with respect to which pleas in bar have in general been considered, except that it is always occasioned by a former bill, it is not liable to any plea which will not hold to the first species of bills. And a cross bill is not liable to some pleas which will hold to the first species of bills; as pleas to the jurisdiction of the court, and pleas to the person of the plaintiff, the sufficiency of which seem both affirmed by the original bill; unless the cross bill is exhibited in the name of some person alone, who is alone incapable of instituting a suit, as an infant, a feme covert, an idiot, or a lunatic.

It has been already mentioned under the heads of bills of review, that a part of the constant defence to a bill
of

of review, for error apparent on a decree, is by a plea of the decree. 1 *Vern.* 392. *Nelf. Rep.* 53. Where any matter beyond the decree, as length of time, a purchase for a valuable consideration, or any other matter, is to be offered against opening of the inrolment, that matter must also be pleaded. 2 *Ves.* 109. A bill of review, upon the discovery of new matter, seems liable to any plea which would have avoided the effect of that matter, if charged in the original bill. Supplemental bills in the nature of bills of review seem to be in the same situation; and if the matter alledged to have been discovered since the decree, came to the plaintiff's knowledge before the decree, the defendant to the bill may plead this fact in bar. 2 *Atk.* 40. If a decree is sought to be impeached on the ground of fraud, the proper defence seems to be a plea of the decree, accompanied by a denial of the fraud charged. 1 *Brown. Parl. Ca.* 414.

If a plaintiff, filing a bill to carry a decree into execution, has no right to the benefit of the decree, the defendant may plead the fact, if it is not so apparent on the bill as to admit of a demurrer.

A bill, filed by the direction of the court, for the purpose of obtaining its decree touching some matter not in issue by a former bill, is not likely to be exposed to a defence by plea, as it is generally considered by the court before it is directed to be brought. But in its nature it is open to almost every plea already mentioned, except, perhaps, pleas to the jurisdiction of the court, and to the person of the plaintiff. Indeed if the bill is mistakenly brought in the name of a person alone, who is alone incapable of instituting a suit, a plea to the person of the plaintiff will hold.

Having thus considered some of the principal grounds upon which pleas may be supported, it may be proper to observe some particulars which are necessary to be attended to in framing pleas in general.

In

In pleading there must be the same strictness in equity as at law, 2 *Atk.* 632. at least in matter of substance. A plea in bar must follow the bill, and not evade it, or mistake the subject of it. *Bunb.* 70. It must be *ad idem.* 2 *Atk.* 603. A plea may be bad in part, and not in the whole. 1 *Atk.* 53. This, however, must be understood with exceptions. 1 *Ves.* 205. If a plea does not go to the whole bill, it must express to what part of the bill the defendant pleads; and therefore a plea, to such parts of the bill as are not answered must be over-ruled, as too general. 3 *Atk.* 70. *Mos.* 40. So if the parts of the bill, to which the plea extends, are not clearly and precisely expressed; as if a plea is general, with an exception of matters after mentioned, and is accompanied by an answer; the plea is bad. For the court cannot judge what the plea covers, without looking into the answer, and determining whether it is sufficient or not, before the validity of the plea can be considered. 2 *Ves.* 108.

A plea must aver facts to which the plaintiff may reply, and not, in the nature of a demurrer, rest on facts in the bill. 3 *Atk.* 558. This, however, is not a very strict rule; and where a matter, though ground of demurrer, is negative; as the want of the usual affidavit to a bill for discovery of deeds, and for relief; it may, though perhaps not regularly, be pleaded. The averments in a plea ought in general to be positive. But in some cases a defendant has been permitted to aver according to the best of his knowledge and belief; as that an account is just and true. 3 *Atk.* 70. *Toth.* 70. And in all cases of negative averments, and of averments of facts not within the immediate knowledge of the defendant, it may seem improper to require a positive assertion. But unless the averment is positive, the matter in issue appears to be, not the fact itself, but the defendant's belief of it. And the conscience of the defendant is saved by the nature of the oath administered; which is, that so much of the plea as relates to his own acts is true, and that so much as relates to the acts of others

others he believes to be true. All the facts necessary to render the plea a compleat equitable bar to the case made by the bill, so far as the plea extends, that the plaintiff may take issue upon it, must be clearly and distinctly averred.

Gilb. Ch. 58. Averments are likewise necessary, to exclude intendments which would otherwise be made against the pleader; and the averments must be sufficient to support the plea. *2 Ves.* 245. If there is any charge in the bill, which is an equitable circumstance in favour of the plaintiff's case against the matter pleaded; as fraud, or notice of title; that charge must be denied by way of answer, as well as by averment in the plea. In this case the answer must be full and clear, or it will not be effectual to support the plea, *3 Atk.* 304, 815. *3 Wms.* 145. *3 Brown. Parl. Ca.* 373, 374. for the court will intend the matters so charged against the pleader, unless they are fully and clearly denied. *2 Atk.* 241. *Gilb.* 185. Though the court, upon argument of the plea, may hold these charges sufficiently denied by the answer to exclude intendments against the pleader, yet if the plaintiff thinks the answer to any of them is evasive, he may except to the sufficiency of the answer in those points. A defendant may also support his plea by an answer touching any thing not charged by the bill, as notice of a title, or fraud. For by such an answer nothing is put in issue covered by the plea from being put in issue, and the answer can only be used to support, or disprove, the plea. *Gilb.* 58. But if a plea is coupled with an answer to any part of the bill covered by the plea, and which consequently the defendant by the plea declines to answer, the plea will upon argument be over-ruled. *2 Atk.* 155. *Gilb.* 58.

If the plaintiff conceives a plea to be defective in point of form or substance, he may take the judgment of the court upon its sufficiency. And if the plea is allowed upon argument, or the plaintiff, without argument, thinks it, though good in form and substance, not true in point of fact, he may take issue upon it, and proceed to disprove the facts upon which it is endeavoured to be supported. *Prac.*

Reg. 283. For if the plea is, upon argument, held to be good in law, or the plaintiff admits it to be so by replying to it, the truth of the plea is the only subject of question remaining, so far as the plea extends; and nothing but the matters contained in the plea, as to so much of the bill as the plea covers, is in issue between the parties. *3 Wms.* 95. *Prec. in Ch.* 58. *1 Ch. Rep.* 174. If, therefore, issue is thus taken upon the plea, the defendant must prove the facts it suggests. If he fails in this proof, so that at the hearing of the cause the plea is held to be no bar, the plaintiff is not to lose the benefit of the discovery sought by the bill, but the court will order the defendant to be examined on interrogatories, to supply the defect. *Nelf. Rep.* 119. But if the defendant proves the truth of the matter pleaded, the suit, so far as the plea extends, is barred; even though the plea is not good, either in point of form or substance. Therefore if a defendant pleads a purchase for a valuable consideration, and omits to deny notice, and the plaintiff replies, the plea, though irregular, is admitted to be good, and the fact of notice not being in issue, the defendant, proving what he has pleaded, is intitled to have the bill dismissed. *3 Wms.* 94.

If a plea requires an answer to support it, upon argument of the plea the answer may be read to counterprove the plea; and if the defendant appears not to have sufficiently supported his plea by his answer, the plea must be overruled, or ordered to stand for an answer only. *3 Atk.* 304. A plea is usually ordered to stand for an answer, where it states matter which may be a defence to the bill, though perhaps not proper for a plea, or informally pleaded. But if a plea states nothing which can be a defence, it is merely overruled. If a plea is ordered to stand for an answer, it is allowed to be a sufficient answer to so much of the bill as it covers, *Mos.* 74. unless by the order liberty is given to except. *3 Atk.* 815. *3 Wms.* 239. But that liberty may be qualified, so as to protect the defendant from any particular discovery which he ought not to be compelled to make.

make. 2 *Atk.* 241. And if a plea is accompanied by an answer, and it is ordered to stand for an answer, without liberty to except, the plaintiff may yet except to the answer, as insufficient to the parts of the bill not covered by the plea. *Mos.* 74. If a plea, accompanied by an answer, is allowed, the answer may be read, at the hearing of the cause, to counterprove the plea. 3 *Atk.* 303.

There are some pleas which are not usually argued; but, being clearly bars, if true, either they are pleaded with such circumstances that their truth cannot be disputed, or, being mere matter of fact, they are referred to one of the Masters of the court, to inquire into the truth of the fact. *Ord. Canc.*

98. Such are pleas of outlawry or excommunication, which are always pleaded *sub sigillo*. Pleas of a former decree, or of another suit depending, are generally in the same predicament, being referred to a Master to inquire into the fact. 1 *Atk.* 53. *Ord. Canc.* 98. If, in any of these cases, the Master reports the fact true, the bill stands immediately dismissed, unless the court otherwise orders. 1 *Chan. Ca.* 241. But the plaintiff may except to the Master's report, and bring on the matter to be argued before the court. *Durand v. Hutchinson, Michaelmas 1771*, on exceptions. And if the plaintiff conceives the plea to be defective in point of form, or otherwise, independent of the mere truth of the fact pleaded, he may set down the plea to be argued, as in the case of the pleas in general. *Ord. Canc.* 98. 3 *Atk.* 587. 1 *Vern.* 332.

Pleas to the jurisdiction of the court, or in disability of the person of the plaintiff, or defendant; or pleas in bar of any matter of record, or of matters recorded, or as of record in the court itself, or any other court, need not be upon oath. *Ord. Canc.* 96. *Prac. Reg.* 174. But pleas in bar, of matters *in pais*, must be upon oath.

Introduction to a Plea.

The plea of ———, defendant, to the bill of complaint of ———, complainant.

This defendant, by protestation, not confessing or acknowledging all or any of the matters and things in the complainant's said bill of complaint contained to be true, in such manner and form as the same are therein and thereby alledged for plea unto the said bill, saith, That, &c.

Conclusion to a Plea.

All which matters this defendant doth aver and plead in bar of the complainant's said bill, and of the complainant's pretended demands, for which he seeks relief; and this defendant prays to be hence dismissed, with his reasonable costs and charges in this behalf wrongfully sustained.

Or thus:

And therefore this defendant doth plead the said (act of parliament, release, &c.) in bar to the said complainant's bill; and humbly demands the judgment of this honourable court, whether he shall be put to make further answer thereunto; and prays to be hence dismissed, &c.

Of Answers.

AN answer is that which the defendant pleadeth or saith in bar, to avoid the plaintiff's bill or action, either by confessing and avoiding, or traversing and denying the material parts thereof; that is, such matters as are necessary to substantiate the proceedings, and make them regular, and effectual in a court of equity; for any plaintiff is intitled to a discovery from the defendant of the matters charged in the bill, provided they are necessary to ascertain facts material to the merits of his case, and to enable him to obtain a compleat decree. *West. Symb. 104.* And this

this is required as well to supply proof which cannot otherwise be procured, as in aid of proof which may be procured, and to avoid expence. 2 *Ves.* 492.

An answer must contain nothing scandalous or impertinent, under the like penalty as a bill, *viz.* good costs: if the defendant set forth matter *dehors*, and not material to his defence, it will be considered as impertinent, and, upon application, may be expunged: if any thing scandalous be inserted, that will also be expunged by a like application; but nothing relevant can be deemed scandalous. *Mof.* 45, 70.

An answer to a matter, charged as a defendant's own fact, must regularly be without saying, *To his remembrance*, or *as he believeth*, if it be laid to be done within seven years before, unless the court, upon exceptions taken, shall find special cause to dispense with so positive an answer; and if the defendant deny the fact, he must traverse or deny it (as the cause requires) directly, and not by way of negative pregnant, as if he be charged with a receipt of money, he must deny or traverse, that he hath not received that sum, or any part thereof, or else set forth what part he hath received. And if a fact be laid to be done with divers circumstances, the defendant must not deny or traverse it literally as it is laid in the bill, but must answer the point of substance positively and certainly. *Ord. Canc.* 100.

Whenever there are particular and precise charges, they must be answered particularly and precisely, and not in a general manner, though the general answer may amount to a full denial of the charges.

As to the act of another, which defendant does not certainly know, he ought to say, he has heard and believes, or thinks to be true, or that he does not think or believe it to be true, and not to say only, that he has heard. *Prac. Reg.* 7. A defendant having sworn, that he received no more than such a sum, to his remembrance, allowed upon exceptions. 1 *Vern.* 470.

Ordinarily an answer ought not to set forth deeds *in hæc verba*; and tho' the bill pray the defendant may so set them forth, yet if the defendant, in his answer, say, he is ready to let the plaintiff have copies of them; or if he do not say so, but set forth part of them only, it seems well; and the court will order that the plaintiff have liberty, at his own expence, to take copies of them, without sending them to a Master; or order the defendant to produce them at the examination of witnesses, or leave them with his clerk in court, &c. as there is occasion. *Prac. Reg.* 10.

A practice has hitherto universally prevailed, of concluding an answer by a general traverse or denial of all the matters in the bill; and this is said to have obtained formerly and in ancient times, when the defendant used only to set forth his case in the answer, without answering every clause in the bill: if the answer be full, the adding the general traverse is surplusage, and is rather impertinent than otherwise, and has been determined in such case to be unnecessary: yet it is still continued. *2 Wms.* 87.

The answers of parties in the country are taken by commission.

The old rule of court, before the stat. 4 & 5 Ann, c. 16. for amendment of the law, was, to send to the commissioners the tenor of the bill, and they examined the defendant, in taking his answer by this tenor in the same manner as if they had been examining him upon interrogatories; and in the return of the commission, certified the method in which they took his answer; so that there was no occasion either for the council or the party to sign the answer; but by degrees, the inserting the tenor of the bill in the commission, was done in so loose a manner in the office, that it became a mere ballad, and was of no real use to the parties, and did not at all answer the end of assisting the commissioners in framing the answer, but was a fruitless and unnecessary expence; so that the act of parliament for amendment of the law, very judiciously took away the practice of sending with the commission *tenorem billæ*.

3 Atk. 440.

Answers:

Answers and pleas returned by commission, formerly were not signed by the party swearing such answers or pleas. Lord *Hardwick* taking notice of so irregular a practice, whereby it became very difficult to convict any defendants of perjury, who had forsworn themselves in an answer or plea, and also observing, that it had been the constant practice for defendants, who swear their answers or pleas before a Master, to sign the same at the time of taking them, Ordered that all answers and pleas, as well those which shall be taken by commission, as those which shall be taken before any Master of this court, be signed by the party swearing such answer or plea, in the presence of the Master, or of the commissioners before whom the same shall be taken respectively. *April 27, 1748. 2 Atk. 290.*

An answer in a town cause must be signed by council: where it is taken by commission in the country, there is no necessity for a council to sign it: in early times, when an answer was taken by *dedimus* on the tenor of the bill, the commissioners being barristers at law, the signature of other council than the commissioners was dispensed with; and at present, in a country cause, where the answer is taken by commission, although the answer usually is drawn or perused and settled by council, his signature does not always appear upon the record. In all cases the answer must be upon oath or affirmation, unless in the case of peers or peereffes of the realm, or bishops, who are to answer upon protestation of honour only. *Ord. Canc. 40.* And this ceremony is sometimes dispensed with; where there is an amicable defendant, his answer may be taken without oath, by consent of the plaintiff, under an order obtained of course for that purpose.

Whatever part of a bill is not covered by a demurrer or plea, must be defended by answer, unless the defendant disclaims: for if a plea be over-ruled, the defendant may insist on the same matter by way of answer, *2 Wms 95. 1 Atk. 450.* but if the discovery sought by the bill is matter of scandal, or will subject the defendant to any pain,

penalty * or forfeiture, he is not bound to make it, 1 *Vern.* 109. and if he does not think proper to defend himself from the discovery by demurrer or plea, according to the circumstances of the case, he may by answer insist that he is not obliged to make the discovery. 2 *Wms.* 238. 2 *Ves.* 491. In this case the plaintiff may except to the defendant's answer as insufficient, and upon those exceptions it will be determined, whether the defendant is or not obliged to make the discovery. If the defence which can be made to a bill, consists of a variety of circumstances, so that it is not proper to be offered by way of plea, 1 *Atk.* 54. or if it be doubtful whether as a plea it will hold; the defendant may set forth the whole by way of answer, and pray the same benefit of so much as goes in bar, as if it had been pleaded to the bill, 2 *Wms.* 45. or if the defendant can offer a matter of plea which would be a compleat bar, but has no occasion to protect himself from any discovery sought by the bill, and can offer circumstances which he conceives to be favourable to his case, and which he could not offer, together with a plea, he may set forth the whole matter in the same manner. Thus if a purchaser for valuable consideration, clear of all charges of fraud or notice, can offer additional circumstances which he cannot set forth by way of plea, or of answer to support a plea; as the expending a considerable sum of money in improvements with the knowledge of the plaintiff, it may be more prudent to set forth the whole by way of answer, than to rely on the single defence by way of plea. Although the defendant by his answer denies the title of the plaintiff, yet in many cases he must make the discovery prayed by the bill, though not material to the plaintiff's title; and though the plaintiff, if he has no title, can have no benefit from the discovery. As if a bill

* *Sed vid.* 2 *Vern.* 244. where it seems as if a defendant will be obliged to discover where the penalty arises from his own particular agreement: and *Moj.* 77.

be filed for tithes, praying a discovery of the quantity of land in the defendant's possession, and of the value of the tithes; though the defendant insists upon a *modus*, or upon an exemption from payment of tithes, or absolutely denies the plaintiff's title, he must yet answer to the quantity of land, and value of tithes, *Hardr.* 130. *sed vid. Gilb.* 229. or if a bill be filed against an executor by a creditor of the testator, the executor must set forth an account of the assets he is possessed of, though he denies the debt. *Hardr.* 188. *Ayl.* 547.

A counsellor, clerk in court, or solicitor is not obliged to answer what he knows of his client's case as such—neither is a referee where it is agreed that what passes in the reference shall not be disclosed or made use of on either side. *Prac. Reg.* 8.

If a man by answer swear that what he received, he received as a menial servant, and hath paid it over to his master, he shall not be put to account again, but he ought to disclose this matter in his answer, *1 Vern.* 136, 208. for a plea of this sort was over-ruled. *1 Vern.* 95.

A defendant may be held to the offer made in his answer, though the circumstances of the case are varied from what they were when the answer was put in. *1 Vern.* 448.

Notice may be denied, either in the plea or answer, where the defendant pleads himself a purchaser for a valuable consideration. *Mof.* 73.

If fraud be charged in a bill, it must be denied by answer, and not by way of plea. *1 Vern.* 185.

In some cases a defendant may by answer insist against a discovery prayed by a bill, to which if he had demurred, it would have been admitting the facts to be true; as where *S.* gave a bond to pay 800*l.* a year to *H.* during *S.*'s enjoying the office of _____ or whilst any body held it in trust for him, *H.* put the bond in suit, *S.* brings a bill for an injunction, and a cross-bill is brought by *H.* to discover whether *E.* held the office in trust for *S.*

S. J. in his answer insisted that he was not obliged to discover that which would make him liable to the several acts which vacate a seat in parliament, upon a member's accepting a place. *Per cur.* The defendant has done right in insisting upon this matter in his answer, he could not demur to it, because that would have been admitting the facts to be true; he is not obliged to make the discovery. Ruled upon exceptions to defendant's answer. 3 *Atk.* 276.

In an answer a purchaser for a valuable consideration, need set forth no deeds or writings, except those by and under which he more immediately claims. Nor need a purchaser without notice, or any in the like case, as is said, in his answer, or plea, set out the conveyances at large, nor the sums or dates, but only in general say, by good and sufficient conveyances in law, or such in particular for a real and valuable consideration in money paid. *Prac. Reg.* 14.

In an answer to a bill to redeem, the mortgagee ought to say, he is willing to receive his money as the court shall direct: for then the court will not order him to receive it without a reasonable notice, but if he say generally, he is ready to receive his money, the court will order it to be paid immediately. *Prac. Reg.* 15.

If defendant by answer to a bill, to be relieved against the penalty of a bond, say he does not insist upon the penalty; but is ready to receive his principal, interest, and costs, the parties shall be forthwith sent to a master to examine what is due, &c. *Ibid.* In an answer to be relieved against an action at law, if the defendant swears money to be due, the court will sometimes order a judgment to be given in debt with release of errors, or the injunction to be dissolved. *Ibid.*

Where there is a joint and several answer by *A.* and *B.* if *A.* for himself answers, and *B.* says that he hath received the answer of *A.* and believes it to be true, supposing *B.* charged with nothing of his own knowledge,
such

such a relative answer is sufficient; but it is otherwise where the defendants answer severally. *Hardr.* 105.

In a cross-bill, the defendant to the original bill ought to answer before he sues out process upon the cross-bill, and if the defendant in the cross-bill be threatened with process, he may obtain an order to stay proceedings upon the cross-bill until the defendant in the original bill (plaintiff in the cross-bill) hath answered the original bill, for without such order the plaintiff in the cross-bill may proceed to compel an answer.

Where the plaintiff sues both at law and in equity for the same thing, he will be put to make his election in which court he will proceed, but need not however make such election, till the defendant has answered. *3 Wms.* 90.

Where *corporations* are sued here in their political capacity, they answer under the seal of the corporation: but if all those of which the corporation consists, be charged as private persons, they must answer upon oath. Whether a sole body politick must answer upon oath, or not, *dubio*. *Prac. Reg.* 114. *Toth.* 7, 13.

A bill against a corporation to discover writings, the defendants answer under their common seal; and so being not sworn, will answer nothing in their own prejudice. Ordered that the clerk of the company, and such principal members as the plaintiff shall think fit, answer on oath, and that a master settle the oath. *1 Vern.* 117. *Anon.*

If the husband and wife have appeared, and he only answers, an attachment may be issued against both, when the time of answering is out, unless there be an order for him and his wife to answer separately. For though the wife is not ordinarily to answer without the husband, yet in special cases, the court, upon motion, will order that she shall answer alone, without which order, a sole answer made by her will be suppressed, *Prac. Reg.* 23. as where the husband was out of the kingdom, and could not be brought to answer a breach of trust, in which the wife

was mostly concerned, the court ordered that she should answer alone.

Bill against husband and wife, for a demand out of the separate estate of the wife, and the husband beyond sea, and not amenable by the process of the court; yet if the wife be served with *subpœna*, she must appear and answer. 2 *Vern.* 613.

Regularly the answer of a feme covert, if separate, ought to have an order to warrant it; but if the *feme's* separate answer be put in without an order, and the same be a fair and honest answer, and deliberately put in with the consent of the husband, and the plaintiffs accept it, and reply, the court will not at the motion of the wife, or of her executors, set it aside. 2 *Wms.* 371.

A *feme covert* appearing, and obtaining an order to answer separate from her husband who is abroad, the court will not afterwards set it aside. 1 *Ves.* 384.

Frequently the wife is put to answer alone, where the husband is beyond sea, *Toth.* 13. or where she lives separate from her husband, she is after ordered to answer alone. 1 *Ch. Rep.* 68.

If a *feme covert* cannot in conscience consent to such an answer as is drawn up by the husband, she is not obliged to submit to it; upon application to the court, she may be considered as a separate person, and will be allowed to answer distinct and independent of her husband. Where a husband prevails on a wife to put in an answer, contrary to what she believes is the fact, he may be punished for a contempt. 2 *Atk.* 50.

If the wife's answer differs from the husband, it shall not prejudice the husband, as if she confess a trust which he denies, 1 *Chan. Ca.* for she can be no witness against her husband. 2 *Vern.* 79.

A husband's bringing a bill against his wife, is admitting her to be a *feme sole*, and she must put in an answer as such, and there is no instance of appointing a guardian to put in her answer in such case. 3 *Atk.* 478.

Infants have been obliged to answer in equity, when the parol should have demurred at law. *Toth.* 108.

If an infant puts in an answer by guardian, and there is a decree against him without any day to shew cause, such answer shall not be read, or admitted as evidence against him when he comes of age; but if a superannuated defendant puts in an answer by his guardian, it shall be read against him at any time afterward, for he is supposed to grow worse, and is not to have a day to shew cause. *Prec in Ch.* 229. *Eq. Car. Abr.* 281.

An infant is bound by the offer made by him in his answer, if the other side are thereby delayed: and if the infant do not, immediately after his coming of age, apply to the court in order to retract his offer, and amend his answer. *2 Vern.* 224.

An infant will in some cases be permitted to put in a better answer before he comes of age, if his application be grounded upon merits; this is not of course, but must depend upon circumstances, for perhaps he might not be able to come at the same evidence when he is of age; as where the fact he wants to examine to is of long standing, and the witnesses advanced in years, may probably die before he comes of age. *2 Atk.* 532.

If an infant answers by guardian, (which is generally the case) the guardian must be sworn; and if it appear by the caption that he was not sworn, the answer will be quashed. *Prac. Reg.* 183.

It is a motion of course, for a defendant an infant, after he comes of age, to be at liberty to put in a new answer, or amend his answer, put in whilst he was an infant, if he has a day by the decree to shew cause after he comes of age, *Mof.* 67, 308. *1 Wms.* 504. The consequence of an infant's putting in a new answer is that he may examine witnesses anew to prove his defence, which may be different from what it was before. *2 Wms.* 400.

Where

Where a prisoner has appeared, he shall not be brought up to answer till the time for answering be out ; and if he will not answer, he must be brought up by *habeas corpus*.

There are no certain rules for amending answers ; in this the court exercises a discretion ; for the amendments in an answer are not confined merely to mistakes in the ingrossment of the answer, where that has differed from the original draught ; there are instances of permitting answers to be amended as to mistakes in matters of fact ; and sometimes even after an indictment for perjury, when the perjury assigned has been upon particular points in the answer : but that has been only where the circumstances have been extremely strong to shew that it could have arisen from a mere mistake. *Barn. 51.*

The most common cases of amending answers are, where through inadvertency a defendant has mistaken a fact or a date, there the court will give leave to amend, to prevent a defendant from being indicted for perjury.

The defendant may, without notice, move to amend his answer in a small matter, but if it be in a material point, he must give notice of the motion for such amendment to the plaintiff's clerk in court ; and though it be in a material point, and after issue joined, yet the court will, on affidavit of surprize, and payment of costs, allow of the amendment. *Eq. Ca. Abr. 29.*

The court will not allow a defendant to amend an answer, by striking out of it a fact by which the plaintiff would be deprived of the benefit of this evidence, especially where he does not swear he was surprized into it, or ill advised in setting it forth. *3 Atk. 522.*

A defendant has been allowed to amend his answer after hearing, and decree on affidavit of the Solicitor and his Clerk, that the mistake was in the ingrossing the answer from the draught, and the draught produced. *2 Wms. 426.*

The defendant may without notice move to amend his answer in a small matter, but if it be in a material point, he

he must give notice of the amendment prayed, to the plaintiff's Clerk in court. If it be a material point that he prays to amend, the court often grants it, if the defendant was surprized therein. *Prac. Reg.* 11. An answer may not be amended after issue joined, yet it has been sometimes done. *Ibid.*

Under particular circumstances, the court will permit the defendant to amend his answer by adding a *new fact*, as where the answer referred to deeds executed in *Spain*, and consequently made it incumbent on the defendant to produce them: the custom of *Spain* is to deposit deeds, &c. in places appointed for that purpose, so that an authentic copy is all that can be had in such case. Therefore defendant was permitted to amend his answer, so far as to set forth the custom of *Spain*, with regard to the disposition of deeds. 2 *Atk.* 294.

Words of course before an Answer.

The answer of ——— one of the defendants to the bill of complaint of ——— complainant.

This defendant now and at all times hereafter, saving and receiving to himself, all and all manner of benefit and advantage of exception, that may be had or taken to the many errors, uncertainties, and manifest insufficiencies in the complainant's said bill of complaint contained, for answer thereto, or unto so much thereof as this defendant is advised is material or necessary for him to make answer unto, he answereth, and saith, that, &c.

Conclusion to an Answer.

And this defendant denies all and all manner of unlawful combination and confederacy wherewith he is charged, without that, that there is any other matter, cause, or thing in the complainant's said bill of complaint contained, material or effectual in the law, for this defendant to make answer unto, and not herein and hereby well and sufficiently answered, avoided, traversed,

or denied is true, to the knowledge and belief of this defendant. All which matters and things this defendant is ready and willing to aver, maintain, and prove as this honourable court shall direct, and humbly prays to be hence dismissed with his reasonable costs and charges in the law, in this behalf most wrongfully sustained.

Of Disclaimers.

AN answer denying all right or title to the thing in demand, by the plaintiff's bill, and renouncing all claim thereto, is termed a *disclaimer*; and which not unfrequently arises from a mistake of the plaintiff, in making a person party to a suit, who is in no wise interested in or liable to be sued for the matters in question.

Upon a disclaimer's coming in, the court will in general consider the cause as instituted for vexation only, and dismiss the bill with costs. But if plaintiff shew a probable cause or reason for exhibiting his bill, he may pray a decree against the defendant, and all claiming under him since the time of the bill exhibited, upon the ground of the disclaimer, which is commonly granted without costs on either side. *Pr. H. Ch. 11. Prac. Reg. 141.*

Where the defendant disclaims generally to all the matters in the bill, the plaintiff is not to reply, and if he does, and serves the defendant with a *subpœna* to rejoin, the defendant may have costs against him for the vexation. 3 *Pr. Al. 61.*

It seems as if the defendant is intitled to move for his costs, when the plaintiff does not reply, but sets down the cause upon the disclaimer, and serves a *subpœna* to hear judgment, otherwise the bill would be dismissed with forty shillings costs only, as upon bill and answer.

A defendant disclaimed generally, as to all the matters in the bill; the plaintiff ought not to have replied to her answer; by doing so, and serving her with a *subpœna* to rejoin, she is intitled to have costs to be taxed for the vexation.

vexation. *Secus* where the disclaimer is to one part, and the answer is as to another part. 3 *Atk.* 582. *Williams v. Longfellow.*

If the disclaimer be only to a part of the matters in question, but as to the other part, there is a plea or answer, in that case, there may be a replication to such part that contains the plea or answer. *Cur. Canc.* 133.

If one be named defendant in a bill among other material defendants who in no wise pretends any right to the matters in question, and he thereupon disclaims, he may after such disclaimer, upon a motion for that purpose, be examined as a witness in the cause, for it shall be presumed his name was inserted in the bill, without other cause than only to take away his testimony from the other defendants. *Cur. Canc.* 133.

Where a title is set up to an estate by a bill, and you make a person defendant who disclaims all right, and do not bring him to hearing, the court said you shall not read his evidence as a proof of your own right, to the prejudice of another defendant. 2 *Atk.* 39. *Hill v. Adams.*

The defendant ought regularly to wait three terms after his disclaimer is put in, before he moves for costs, because plaintiff may amend his bill, and get a decree upon the ground of the disclaimer; and otherwise, if defendant move for costs he ought to give notice.

A disclaimer being, in point of form, an answer, the words of course preceding and concluding the one, are pursued in regard to the form of the other.

Of filing and arguing Demurrers.

THE appearance being regularly entered, it was anciently the practice, to give a rule for defendant to answer, which expired on that day se'ennight, exclusive of the day of appearance. The giving a rule, has of late years been discontinued, but the time for answering remains the same.

A demurrer, as it asserts no fact, but relies on matter apparent upon the face of the bill, is put in without oath, and without being signed by the party: It is therefore considered, that the defendant may, by advice of council, upon the sight of the bill only, be enabled to demur; for this reason a demurrer not coupled with a plea or answer, must be filed within the eight days, exclusive of the day of appearance, or before an order for time be obtained: the court never indulging a defendant with time to demur alone; nor can a demurrer under an order for time be regularly filed*; it being the special condition of every order for time, that the defendant shall not demur alone. And therefore if a defendant pray an order for time, and a commission to take his plea, answer, or demurrer, not demurring alone, and under such commission return a demurrer only, the defendant will be liable to pay five marks costs; and although the demurrer be allowed, the defendant shall have no costs, *Ord. Canc.* 96. for it might have been put in without such commission, and the plaintiff was put to the needless trouble of attending the commission; or if upon a *dedimus* to take an answer only †, a demurrer alone be returned, an attachment may be awarded for want of answer. *Ca.* 110. *Prac. Reg.* 136. *Cur. Canc.* 106.

If a defendant having a commission to answer only, tender a demurrer to the commissioners, and refuse to answer upon oath, they are to return such his refusal, and the reason thereof, together with the demurrer, and leave the same to the consideration of the court. *Prac. Reg.* 81.

* A demurrer after a petition for time would be irregular. 2 *Wms.* 464.

† A demurrer allowed, but without costs, because it was a demurrer only without any answer, and came in by commission. *Elme v. Shaw.* 1 *Vern.* 282.

The tenor of a commission pursuant to an order for a commission to plead, answer, or demur, not demurring alone (from whence it is termed a special commission) does not authorize the commissioners to reject a demurrer, unaccompanied with a plea or answer, if tendered; and in that particular the commission seems not to pursue the substance of the order: but a defendant would, in such case, be very ill advised to put in a demurrer only; subjecting himself to costs, even if it be allowed, when he can reap the fruit of his demurrer, by coupling an answer with it, denying combination merely, and recover costs.

It seems, if a defendant be in contempt to an attachment, and tenders or pays the costs of the contempt, he may file his demurrer; but after a contempt duly prosecuted to an attachment, with proclamations returned, no plea or demurrer shall be admitted, unless upon motion and affidavit, satisfying the court of the cause of delay. *Ord. Canc. 99.*

The defendant sometimes files his demurrer within the eight days; but in general he waits until the plaintiff's clerk in court calls upon him for his answer, and then files the demurrer immediately. It has before been observed, that although a defendant be restricted by an order for time from demurring alone, he may by answering any immaterial fact, or denying combination only, put in a demurrer to the whole, or any part of the bill, and a demurrer, accompanied with such an answer, will be received: this has been held to be within the terms of the order, where the defendant cannot answer further, without over-ruling his demurrer. A defendant by this manœuvre, may put in a demurrer, after an order for time, because the answer legitimates the demurrer.

When a demurrer comes in, which it is apprehended will hold, the plaintiff, if he intend to proceed no further, may move for an order to dismiss his bill with costs, or set down the demurrer to be argued; and if it be

allowed, the costs are five pounds : and the latter seems the better way, if the costs of dismissal are likely to exceed that sum ; for defendant cannot dismiss the bill after a demurrer allowed. After a demurrer filed, the plaintiff will sometimes amend his bill, and this he may do by order obtained on motion or petition, upon payment of 20 shillings costs, before the demurrer is set down for argument, otherwise he must pay the defendant the costs of setting down the demurrer, and 20 shillings besides, before he can amend. *Mof.* 301. And generally, when a demurrer is put in upon a slip or mistake in a bill, the plaintiff obtains an order to amend, upon payment of 20 shillings costs ; and this he takes care to do, before the demurrer is set down for argument.

If a demurrer be not by the defendant, within eight days after filing, entered with the Register, in order to be argued, it is over-ruled of course, and the plaintiff may take out process for forty shillings costs, and to make a better answer. *Ord. Canc.* 97, 185.

The defendant having appeared, and taken an office copy of the bill, generally lays it before council to make his defence by demurrer, or otherwise : if it be by demurrer only, the draught of the demurrer being settled and signed by council, a transcript thereof must be fairly ingrossed on parchment with an half crown stamp, and brought to the defendant's Clerk in court, to be filed : within eight days after the filing, it must be entered, which is done by the defendant's Clerk in court, leaving a note in the following form with the Register, paying at the same time one shilling ; and formerly a certificate from the Six-clerk, of the pleadings being filed, was produced, but it has of late years been dispensed with. *Ord. Cane.* 185.

Elley
v. } Enter Demurrer.
Edwards

10 June—1783. Hinde Clk.

And

And so if a demurrer be accompanied with a plea or answer, or both, the demurrer and plea must be entered, or they are over-ruled of course.

Either side may, by leaving a petition (*vid. tit. Petition*) at the Chancellor's Secretary's office, apply to the Lord Chancellor for an order to set down the demurrer to be argued. No deposit is requisite. The petition as answered (for which twenty shillings is paid to the Secretary) being left with 4 s. 6 d. at the Register-office, to draw up and pass the order, and 1 s. 6 d. for entering, and also 1 s. paid for setting the demurrer down; a copy of the order so passed and entered must be served upon the opposite Clerk in court, by leaving the copy, and shewing the original order to the Clerk or his agent at his seat, two days before the day for hearing. And briefs of the bill and demurrer being prepared and given to council, the demurrer comes on regularly to be heard: if it be disallowed, the plaintiff must award an attachment for want of answer, and a *subpœna* for five pounds costs; and so when the demurrer is allowed the defendant recovers five pounds costs by *subpœna* against the plaintiff. And if there be a demurrer and answer after the demurrer is over-ruled, exceptions must be taken to the answer. So if there be a demurrer and plea, upon over-ruling the demurrer exceptions must be filed to the plea, if ordered to stand for an answer. There are some cases in which the court orders no costs upon allowing or over-ruling a demurrer, but such instances are very rare.

No demurrer is to be set down for hearing on any certain day, except the order for setting down the same be brought to the Register, to be entered at least two days before the day appointed for hearing such demurrer: and after the paper of demurrers and pleas is made out, and set up in the Register-office, no alteration is to be made therein. *Ord. Canc. 52.*

If a demurrer and answer be put in, the answer cannot be proceeded on until the demurrer has been argued.

Of filing and arguing Pleas.

Pleas are of three kinds :

1. *To the Jurisdiction of the Court.*
2. *To the Person of the Plaintiff or Defendant.*
3. *In bar to the Plaintiff's Suit.*

PLEAS to the jurisdiction of the court, or in disability of the person of the plaintiff or defendant, need not be on oath, because it is presumed, a defendant may by advice of council, upon sight of the bill only, be enabled to put in any just plea, which he hath in disability of the plaintiff, or to the jurisdiction of the court. Such pleas therefore under the hand of council shall be received, and filed, although the defendant do not deliver the same in person, or by commission. *Ord. Canc. 97.*

One plea only shall be admitted to the jurisdiction; wherefore, if the defendant plead such plea as is not sufficient in it's nature, or plead the matter insufficiently, he will be put to answer. *Prac. Reg. 275.*

Pleas to the jurisdiction must be determined in open court; and for that purpose, the defendant is to enter the same with the Register, within eight days after the filing thereof, or, in default of such entry made, the same shall be disallowed of course as put in for delay; and the plaintiff may then take out process to enforce the defendant to make a better answer, and pay forty shillings costs: and the same shall not be afterwards admitted to be set down or debated, unless upon motion it shall be ordered by the court. *Ord. Canc. 97.*

Pleas in disability of the person are outlawry, excommunication, attainder, &c.

A plea of outlawry, if it be in any suit for that duty touching which relief is sought by the bill, is insufficient, according to the rule of law, and shall be disallowed of course, as put in for delay, and the plaintiff may, notwithstanding such plea, take out process to enforce the defendant

defendant to make a better answer, and pay five marks costs, otherwise a plea of outlawry is always a good plea, so long as the outlawry remains in force; and therefore the defendant shall not be put to set it down with the Register. And after the said outlawry reversed, the defendant upon a new *subpœna* served on him, and payment to to him of twenty shillings costs, shall answer the same bill as if such outlawry had not been; but if the plaintiff conceive such plea of outlawry, through mispleading or otherwise, to be ineffectual, he may, upon notice given to the Clerk on the other side, set it down with the Register, to be debated with the rest of the pleas and demurrers in course. But if the plaintiff shall not in such case enter it with the Register within eight days after the same shall be filed, the defendant may take out process against the plaintiff, for his ordinary costs of five marks, as if the same had been heard. *Ord. Cane.* 98.

Pleas to the jurisdiction must be pleaded *ante litem contestatam*; for by answering the defendant has submitted to the jurisdiction, and the pleas of outlawry, &c. are in the same predicament; after answer the defendant admits the plaintiff a proper person to be answered unto, and therefore such plea would then come too late; but if the outlawry be not pleaded, yet it may be shewed at the hearing, as a peremptory matter against the plaintiff's demand, if it be personal; because it shews the right of the thing in demand to be in the King: and so in the canon law an excommunication might be shewed at the hearing, for it is in the nature of an outlawry with them: and a plea to the person is not set down by the defendant, being *sub pede sigilli*; it appears upon shewing to be a good plea, and therefore is presumed not necessary to be argued before the court; if there be any insufficiency in point of form, the plaintiff must set down the plea. A plea of outlawry in the same cause in which relief is sought by the bill is bad, because the outlawry is part of the *gravamen*, and is *exceptio cuius rei petitur dissolutio*. *Jenk. Cent.* 37.

A plea in bar is generally put in upon oath, and is a kind of special answer, shewing and averring facts to which the plaintiff may reply, and not merely dilatory, as a plea in abatement; therefore the court exercises a liberality to a party making his defence by pleading in bar, with which a defendant pleading in abatement is never indulged, nor in justice intitled to.

A bill preferred against a party living and residing within ten miles of *London* (which is called a town cause), or not above twenty miles, after he has regularly entered an appearance by a Clerk in court, must make his defence by way of plea within eight days, exclusive of the day of appearance, or get an order for time. The court will of course indulge the defendant with three orders for time conditionally to plead, answer, or demur, not demurring alone. The first of these orders must regularly be applied for, and served within the eight days, and each successive order should be applied for, and served before the antecedent order is spent. By a close attention to this practice the proceedings in Chancery would be much expedited, and a plaintiff may, if he pleases, enforce it, by issuing process of attachment upon every default; in the first instance, when no order for time is served before the rule for answering, *viz.* the eight days, has expired; or if, within the time prescribed by a prior order, a subsequent order for further time be not served. This practice, if strictly adhered to, would in a great measure obviate that delay, so much complained of in the proceedings of this court, before a full answer can be procured.

A defendant in a town cause is intitled to three orders for time. Upon the first application the court will make an order for one month; the second order peremptorily prescribes three months; and a third order is granted upon defendant undertaking or consenting by council or Clerk in court, to pay no further time. When a defendant cannot, within the time limited by these orders, put in his answer, the court will make an order for a fortnight or a month's fur-

ther time, upon defendant entering his appearance with the Register, and consenting, by his Clerk in court, that the Serjeant at Arms should go against him, as upon a commission of rebellion returned; and if he answer not by the time allowed him by the order, the plaintiff takes certificates from the Register of the defendant's having entered his appearance, and from the Six-clerk of the answer not being filed; and it is a motion of course to obtain an order for a Serjeant at Arms to go against the defendant, and he must then answer as well as clear his contempt before he be discharged.

These orders are severally and respectively obtained by motion in court on any day in term at the rising of the court, or on a seal day, or by petition to the Master of the Rolls at any time. If the application be by motion, instructions should be given to council to move of course for an order for the time to which the defendant is intitled, as before mentioned: After council has moved, the brief signed by him must be carried to the Register-office, to draw up and pass the order, for which 4*s.* 6*d.* is paid. The order must next be entered, which is done by making a copy thereof, and leaving the copy, and producing the original order, with the entering Register at the same office, who will make the *intratur*, for which 1*s.* 6*d.* is to be paid. The order being thus compleat, a copy thereof must be served upon the adverse Clerk in court, by shewing the original order passed and entered, and delivering the copy to the Clerk in court personally, or by leaving the copy with his agent, at his seat in the Six-clerks Office, producing at the same time the original order passed and entered, in order to ground an affidavit of the service, if necessary to make one; and so in the service of all orders to be served; and if a memorandum of the service were indorsed on the order by the party serving it, at any future time, no difficulty could arise in making the affidavit of service.

The method by petition, is by leaving a proper petition (*vide tit. Petition*) with the Master of the Rolls's Secretary,

at

at his office in the Rolls Yard; 5 s. 6 d. is to be paid when the petition is taken away; the petition, as answered, is to be carried to the Register-office, and the order must be drawn up, passed, entered and served as before. Upon a subsequent application for further time, the time granted upon the former order or orders should be stated. If the defendant be in contempt, that should be also mentioned, and that upon payment or tender of costs of contempt, the defendant may have the time usually granted; if he has stood out far in contempt, the court will perhaps not indulge him with so long time as otherwise; and after a contempt duly prosecuted to an attachment, with proclamations returned, no plea shall be admitted but upon motion. *Ord. Canc.* 99. This is not at present attended to; upon payment or tender of costs of contempt, the defendant is indulged with the same time as if no contempt had been incurred; yet, in strictness, if, in a case falling within the intent and meaning of this order, the plaintiff apply to the court, the defendant would not be indulged with that time to which, if no contempt had been incurred, he would by the course of the court be intitled; and probably the court would impose terms upon him.

Each successive order for time should be applied for, and served in the same manner as above.

A defendant had pleaded in bar to the plaintiff's bill, but the plea was not suffered to be opened, for that it came in by a general *dedimus*, which was to take the answer only, and not to plead, answer, or demur. 2 *Vern.* 275.

A plea unaccompanied with an answer, will be received under the usual order for time to plead, answer, and demur, and if the order be to answer only, the defendant may put in a plea, for that is an answer, and upon oath. 2 *Wms.* 464. *Anon.*

The plea being drawn, or perused and settled by council, must be fairly ingrossed upon parchment, with an half-crown stamp to each skin, if more than one. The *jurata* is to be written at the top on the left side, thus:

Sworn

Sworn at the public office in Symonds-Inn, the ——— day of ———, before

The *jurata* must be properly varied, if the plea be taken elsewhere.

A plea in abatement, being put in without oath, consequently has no *jurata*.

The plea of a Peer or Peerefs of the realm is put in upon attestation of honour.

The plea thus prepared for swearing, the Solicitor produces the defendant at the public office, where the defendant swears to the truth of the plea before the Master attending the office, and the defendant ought to sign his Christian and surname at the foot of the plea, on the right side, in the presence * of the Master; one shilling is paid for the oath. The plea compleat for filing, is left at the public office with the Clerk, and the defendant's Solicitor must give notice to the defendant's Clerk in court, that the plea is sworn, and left at the public office, and the Clerk in court will go to the office, and take it away to file. The Clerk at the public office always makes a memorandum of the delivery of the plea to the Clerk in court, or his agent, who generally subscribes his name thereto.

A defendant within twenty miles of *London*, if he be sick, and unable to attend at the publick office, the Master will go to his place of abode, to take his plea, for which an extraordinary fee of two guineas is paid. *Prac. Reg.* 76.

A plea in abatement is to be signed by council, and ingrossed as before; the Solicitor then carries it to his Clerk in court to be filed.

A defendant residing above twenty miles from *London*, (which is called a country cause) upon his appearing, is intitled of course to an ordinary *dedimus* to take his answer, returnable in the ensuing term, and is therefore seldom called upon until that time to answer: sometimes a plaintiff will, by awarding process of contempt, compel a defendant to seal a *dedimus* after the eight days for answering have expired.

* Page 199. Lord Hardwicke's Order, 1748.

The commissioners under an ordinary *dedimus* (which is made out by a Clerk in court without an order unless it be *ex parte*) are not authorized to take and return a plea. * Tho' the tenour of the writ is to take an answer only, and if a plea be returned it is inconsistent, and the commissioners seem to have exceeded the authority delegated to them *virtute brevis*; yet it has been held that a plea returned by such commission† is regular. A *dedimus* may be, and sometimes is, made returnable on a general return-day, or on a day certain in term, but it is usually made returnable without delay, which, if made out in term, holds to the first return of the ensuing term; if in the vacation, to the last return of the subsequent term. A defendant is intitled of course to three orders for time, as in a town cause, to plead, answer, or demur, not demurring alone; the first of these orders gives six weeks; the second, one month; and a third, three weeks. The defendant being called upon in the ensuing term, after his appearance, as is most usual, to put in his answer, applies by motion, or petition, for an order for a *dedimus*, to plead, answer, or demur, (which is called a special *dedimus*, an ordinary *dedimus* being to take the answer only) and six weeks time to return the *dedimus*, which is always granted of course, and is the first order for time. This special *dedimus* cannot be made out without an order obtained as above, and the commissioners may by virtue thereof return a plea, or a plea and answer, or a plea, answer, and demurrer. These orders for time are respectively made on motion or petition as in a town cause, and are to be drawn up, passed, entered, and served in the same manner as before directed. To obtain the *dedimus*, the order with commissioners names is to be left with the defendant's Clerk in court, who thereupon calls upon the plaintiff's Clerk in court for commissioners names; each party leaves what commissioners names he thinks proper, which are all inserted in the *dedimus*.

The plaintiff's Clerk in court directs (as instructed by his client) to whom of his commissioners notice of executing the *dedimus*, is to be given, and the label is made accordingly.

* 2 Vern. 275.

† 2 Wms. 464.

The *dedimus*, when sealed, is sent by the Clerk in court to his client, who, according to the directions on the label, must give six days notice to the plaintiff's commissioner of executing the *dedimus*, unless it be made out *ex parte*. One commissioner attending on a side is sufficient, but in case none of the plaintiff's attend, the defendant must have two of his commissioners, because no less than two can return the writ. The commissioners being met, one of them opens the *dedimus*, and swears the defendant to his plea, and the plea is then annexed to the *dedimus*, and the caption is written at the foot of the answer, thus :

This plea (and answer) was (or were) taken on the defendant's oath upon the holy Evangelists (and the demurrer of the said defendant was taken without oath) at the house of the said defendant situate in Kinderton in the parish of Middlewich in the county of Chester on the 14th day of January 1784, and in the 24th year of the reign of his Majesty King George the Third, by virtue of the commission hereunto annexed.

A. B.

C. D.

This caption is to be properly varied according to what is taken as a plea, plea and answer, plea, answer, and demurrer, or plea and demurrer ; and whether upon protestation of honour, affirmation or oath, or under the common seal, if a corporation ; and being subscribed by two of the commissioners, they indorse the return on the commission thus :

The execution of this writ appears in a certain schedule (or schedules if more than one) hereunto annexed.

A. B.

C. D.

The commissioners fold it up, and bind it with tape, setting their seals, and names, and send or bring it to the office to be filed ; if a commissioner has the carriage of it, it is taken without oath ; if sent by any other person he swears it has not been opened or altered since he so received it, (sometimes the plaintiff's Clerk will accept it without oath) after which the defendant's Clerk in court files it in the same manner, as directed in taking answers by commission ; and for further and more particular instructions

tions

tions on this subject, the practitioner is referred to the next chapter, which treats of taking answers by commission very fully.

A plea in disability of the person of the plaintiff, or to the jurisdiction of the court, should not be returned upon a commission, for if it be allowed the defendant will have no costs in respect of the plaintiff's needless trouble occasioned by such commission. *Ord. Canc.* 96.

If a defendant do not enter his plea with the Register within eight days after filing, it is over-ruled of course, as put in for delay, and the plaintiff may take out process to enforce the defendant to make a better answer, and pay 40 s. costs, and the same shall not be afterwards admitted to be set down or debated, unless upon motion it shall be ordered by the court. *Ord. Canc.* 9.

By a subsequent order of 29 July 1689. Pleas are to be entered according to the above order, but not without a certificate first had of the filing of the plea. *Ord. Canc.* 185. A certificate is by the present practice not required.

This is intended of a plea of a matter in *pais*, and not of a matter of record or recorded, for it is the plaintiff's part to enter these if he so likes, else the defendant, within eight days after filing of the plea, may take out process for five marks costs as before in outlawry. *Pr. Alm.* 12. *Prac. Reg.* 282.

A plea is entered by the Clerk in court, leaving the following note with the Register, and paying one shilling.

Stradling	} Enter Plea.
v.	
Stiles.	
	Legh Clerk.

January 20th, 1784.

A plea of a former suit depending here for the same matter need not be set down with the Register, being a matter recorded in this court: but if the plaintiff be not satisfied with the plea, it shall be referred to a Master to certify the truth thereof: and if it be determined against the

the plaintiff, he shall pay the defendant five pounds costs: The reference must be procured by the plaintiff, and a report thereon within a month next after the filing such plea, otherwise the bill stands dismissed of course, with the ordinary costs of seven nobles. *Ord. Canc.* 98.

A defendant pleaded that the plaintiff brought a former suit for the same matter, which suit is still depending for ought he knows to the contrary: for the plaintiff it was insisted that this plea was not good, because he does not positively aver that the former suit is still depending, and no issue can be taken upon his knowledge to the contrary: but the Master of the Rolls allowed the plea, because the defendant ought not to have set it down to be argued, for by that he admits that the former suit for the same matter is depending: but the plea ought to have been referred to a Master to examine whether there was a former suit depending for the same matter, or not; and said there needs no positive averment that the former suit is still depending, for that is examinable by the Master; and the defendant never swears to a plea of a former suit depending, but it is always put in without oath. *1 Vern.* 332.

A former bill pending, was pleaded to a second bill, which had an addition of some new matter. Seeing the plea was good, the plaintiff was ordered by the court to pay the usual costs of a plea allowed, and that the defendant should answer a second bill, or the former should be dismissed with twenty shillings costs. *1 Chan. Ca.* 241.

If a suit be depending at common law, or in any other inferior court, it may be pleaded, and the defendant shall not be put to a motion for an election or dismissal: and such plea shall be proceeded in, as a plea of a former suit depending in this court between the same parties, for the same matter. *Ord. Canc.* 99.

If a cause has been dismissed this court, but the dismissal not signed and inrolled, the plea of such dismissal must be upon oath; for, till the inrollment, it is not recorded. *Pr. Alm.* 11. *Prac. Reg.* 282.

If

If a matter not of record or recorded be pleaded, and the plaintiff desires the opinion of the court, whether, if it be true, it be a sufficient bar, it must be argued: and if it be adjudged sufficient, and the plaintiff take issue, the defendant must proceed to prove the truth of his plea by depositions, or other proof, as an answer, &c. if by the defendant's neglect or default, his plea be over-ruled, the court, on motion or petition in time, will order it to be argued, the defendant paying five pounds, the costs on over-ruling. *Dic. Prac. Reg.* 283.

Either party may set down the plea to be argued, and this is done by ingrossing and leaving a proper petition (*vid. sit. Petition*) with the Lord Chancellor's Secretary, to whom ten shillings is to be paid when it is taken away answered. The petition answered, is taken to the Register-office to draw up the order, which is to be passed and entered at the same office, and one shilling paid for setting down the plea, and a copy of the order must be served, two days before the hearing, upon the adverse Clerk in court. The plea being set down for argument, both sides prepare briefs, and if, on arguing, the plea be allowed, the plaintiff is to pay five pounds costs to the defendant, to be recovered by *subpæna*; but if over-ruled, the plaintiff takes out the like process against the defendant for five pounds costs, and issues an attachment for want of answer*. When the plea is ordered to stand for an answer, with liberty to except, the plaintiff takes out a *subpæna* for five pounds costs, and files exceptions to the plea, as in case of an insufficient answer, and when a plea is to the relief only, and directed to stand for an answer, the words, *with liberty to except*, should be added to prevent establishing it as a good answer†. When a plea is ordered to stand for an answer (as sometimes on arguing it is) costs are seldom given on

* *Vide* next head of filing answers as to the service of the *subpæna* for costs.

† 2 *Atk.* 814.

either side, and the benefit of the matter pleaded is generally saved to the hearing. *Prac. Reg.* 283.

Where the plaintiff conceives the plea to be good, tho' not true, he may reply to the plea and take issue upon it, and proceed to examine witnesses as in case of an answer, and in this case when he replies to a plea before it comes to be argued, it is always an admission of the plea, as if it had been argued and allowed: and if the defendant prove his plea, the bill must be dismissed at the hearing; so if the plaintiff amend his bill before he argues his plea, it is an admission of the goodness of the plea, as if the same had been allowed on arguing.

A second plea for want of parties is not good, but such plea cannot be suppressed on motion, but must be set down to be argued. *Mof.* 207.

No plea is to be set down on any certain day, unless the Solicitor shall bring the order for setting down the same to the Register, at least two days before the day appointed for hearing. *Ord. Canc.* 52.

Of filing Answers.

A Defendant in all cases, by the course of the court, has eight days, exclusive of the day of appearance to answer the plaintiff's bill; if he cannot in that time complete his answer, the court, upon application, will of course grant him three orders for time. The time limited by these orders, depends upon the residence of the defendant; if he reside within ten miles (which is called a town cause), or within twenty miles of *London*; the court makes an order upon the first application for one month; upon a second application, a defendant may obtain another order peremptorily for three weeks; and a third order for a fortnight, may be procured upon defendant undertaking or consenting by his council or Clerk in court, to pray no further time. The first of these three orders ought regularly to be obtained,

Q

and

and served before the eight days for answering are elapsed, for after that time, the defendant, in strictness, may be attached for want of answer, if an order for time be not served: and also, each successive order for further time, ought to be served before the precedent order expires; but this is rarely or never attended to, the plaintiff's Clerk in court usually giving the defendant an opportunity of getting an order for time; for although the time for answering has expired, without any demurrer, plea, or answer being filed, by the courtesy of the office, the defendant's Clerk in court expects to be called upon by the plaintiff's Clerk in court for an answer, and also, to have a notice of attachment before any attachment is actually sealed, in order to give his client sufficient notice to procure an order for time. When a defendant cannot perfect his answer within the time, prescribed by the several orders above mentioned, he may apply for further time, stating the particular circumstances of his case, which the court will grant, upon condition that defendant enter his appearance with the Register, as upon an attachment returned, and consenting that a Serjeant at Arms should go against him.

The several orders for time may be obtained by motion in court, or petition to the Master of the Rolls, stating the time already obtained, and praying the time as before mentioned, to which the defendant is intitled. The method of obtaining an order for time, on motion or petition, is by giving instructions to council to move of course any day in term, at the rising of the court, or at the Rolls, or on a seal day, before or after term, for the time to which the party is intitled, the counsel's brief being carried to the Register-office, is to be left with 4s. 6d. to draw up the order, after it is passed, a copy of the order must be made, and entered at the same office, for which 1s. 6d. is to be paid, and the order is to be served by delivering to, and leaving a copy thereof, with

with the adverse Clerk in court personally or with his agent, at his seat in the six Clerk's office, and shewing him at the same time the original order, duly passed and entered, in order to ground an affidavit of the service, if necessary to be made, and so in the service of all orders which require service; and it would not be improper to make a memorandum of the service on the back of the order.

The mode by petition is, by ingrossing and leaving a proper petition addressed to the Master of the Rolls (*vid. tit. Petition*) at the Secretary's office in the Rolls yard, and paying 5s. 6d. when it is taken away; the petition, as answered, is to be left at the Register-office to draw up the order, which is to be passed, entered and served as before.

The answer being drawn or perused, and signed by council, must be ingrossed on parchment, on each skin of which there must be an half crown stamp. The *jurata* must be written at the top of the answer, on the left hand, in the following form;

*Sworn at the publick office in Symond's-Inn ———
day of ——— before.*

In a joint and several answer write *both sworn*.

The answer being thus compleat for swearing, the defendant must be produced at the publick office, where the Master attending the office will swear him to his answer, having first interrogated him as to the knowledge of the contents of it; at the same time the defendant must sign his Christian and surname at the foot of his answer, on the right hand, in the presence of the Master*; for the oath one shilling is paid to the Clerk, and the answer, when sworn, is to be left at the publick office, until the Clerk in court comes to fetch it away to be filed, upon notice given him by the Solicitor, or if the defendant be within 20 miles of London, and sick, the Master ought in

* *Vide* Pag. 199. Lord Hardwick's order, 1748.

strictness to go to him to take his answer, *Prac. Reg.* 76. for which an extraordinary fee of two guineas is paid. Sometimes the defendant in a country cause, if he is in town, will swear his answer at the publick office, or if he chuses, he may come up to town to swear it.

A Quaker puts in his answer upon his solemn affirmation and declaration: and a Peer or Peerefs of the realm, upon protestation of honour only. *Ord. Canc.* 40.

A Jew is sworn upon the Pentateuch, and generally with his hat on.

If the answer be taken without oath or affirmation, which is often the case in an amicable suit, an order must be procured by motion or petition of course, upon plaintiff's consenting thereto, and this order being drawn up, passed, entered, and served upon the adverse Clerk in court, the order must be left with the defendant's Clerk in court, who, when he files the answer, writes at the top,

Without oath by order, dated the——day of——

The method of dispensing with the attestation upon honour of a Peer or Peerefs of the realm, putting in an answer is, *mutatis mutandis*, the same.

In case of a foreigner not sufficiently versed in the *English* language to answer in that tongue, an order of course must be obtained, upon motion or petition, for an interpreter; and the answer being ingrossed in the foreign language, a translation thereof upon parchment must be made by the interpreter, and annexed. The foreigner must be sworn to his answer: the interpreter attending is previously sworn to interpret truly, and conveys to the foreigner the language of the oath, at the same time he swears to the translation as true and just to the best of his ability: and the *jurata* is adapted thereto.

A suit instituted against a defendant, residing above 20 miles from *London*, is termed a country cause; and the defendant must answer in eight days, or pray a *dedimus* to take his answer, (to which he is intitled of course) in default

fault of either an attachment may be awarded. A defendant in a country cause being intitled to a *dedimus* of course, he is seldom called upon to answer till the ensuing term, and then he generally applies for a *dedimus* to take his plea, answer, or demurrer, not demurring alone, (which is called a special *dedimus*) and six weeks time to return it, which is granted of course. The *dedimus* is usually made returnable without delay, which if made out in term time, holds to the first return of the ensuing term, if in the vacation to the last return of the subsequent term.

An ordinary *dedimus*, by which an answer or plea can be taken, is made out by the Clerk in court, without any order, and is made returnable without delay; but regularly the *dedimus* (if the *subpœna* was returnable the first day of the term) ought to be returnable the last day of the term; and when the *subpœna* is returnable the last day of the term, the *dedimus* ought to be returnable the first return of the ensuing term: the present practice is in all cases indiscriminately to indulge the defendant with a *dedimus*, returnable without delay, or on a day certain in term.

And in the two shorter terms, when the defendant lives a great distance from town, he must have a commission with a longer return than when the defendant lives nearer town. The proceedings are generally adapted to the convenience of both parties, and what time the defendant shall have, is usually settled amongst the Clerks in court on both sides.

When the plaintiff will not name commissioners to take defendant's answer, an application must be made to the court, or to the Master of the Rolls by motion or petition (*vid. tit. Petition*) for an order upon plaintiff to name commissioners within a certain time, or that defendant may be at liberty to take his commission *ex parte*. It is the general practice, when a defendant means to plead, to apply for an order for a special commission,

mission, viz. to plead, answer, or demur, not demurring alone; for no special commission can be made out without an order, which is obtained of course, by motion or petition, in the same manner as an order for time in a town cause, before treated of.

A *dedimus* or commission, either to take an answer, or a plea, answer, and demurrer, were formerly granted upon supposition of the defendant's inability to travel, by reason of age, infirmity, or sickness, or in cases of noblemen, corporations, or the like, and therefore anciently were not to be granted, but upon affidavit made of sickness, &c. or other good cause shewn. *West.* 33. But since the business of the court increased, it became a thing of course, and therefore the clause of impotency need not to be inserted therein. And if a defendant live above 20 miles from *London*, he has a *dedimus* of course to take his answer. Heretofore the tenor of the bill was inclosed in or annexed to the *dedimus*; the statute of 4 *Ann.* took it away, and abolished a practice which had long called for redress.

By the constant rules of the court, a *dedimus* to take an answer is returnable the first return of the next term, but by the practice it is not returned till the second return of *Hilary* and *Trinity* terms, because the vacations between *Michaelmas* and *Hilary*, and between *Easter* and *Trinity* are so short; and this practice was allowed by the Master of the Rolls. *Mof.* 176.

It was before observed, a *dedimus* to take an answer only is made out of course, and an order is not necessary, unless plaintiff will not name commissioners to take defendant's answer, or suffer the defendant to take it directed to his own commissioners, and then an application must be by motion in court, or petition to the Master of the Rolls, (*vid. tit. Petition*) for an order upon plaintiff to name commissioners in two days, or in default that defendant may take out a commission directed to his own
com-

commissioners, which is granted of course. Where defendant is advised to demur and answer, or plead and demur, or to demur, plead, and answer, a special commission for that purpose must be obtained, which cannot be made out by the Clerk in court without an order, and the order is to be applied for by motion or petition, in the like manner as above, and served upon the adverse Clerk in court; for a demurrer and answer, cannot regularly be taken under an ordinary *dedimus*, nor can a demurrer only, be regularly returned under any *dedimus*, though a plea alone may by a special or ordinary *dedimus*.

In order to obtain an ordinary *dedimus*, the defendant's Clerk in court calls upon the plaintiff's Clerk in court for commissioners names, to see the defendant's answer taken in the country, by leaving a note in writing with him for that purpose; this is called craving a *dedimus*. The plaintiff's Clerk in court thereupon leaves the names of two or more commissioners with the defendant's Clerk in court, and the defendant naming two or more likewise, all of them are inserted in the *dedimus*, the plaintiff's Clerk in court at the same time directs (as instructed by his client) to which of the plaintiff's commissioners, the defendant is to give notice of executing the commission. The defendant's Clerk in court generally makes out the *dedimus*, directed to his own and the plaintiff's commissioners; the form whereof is as follows:

An ordinary *Dedimus*.

" GEORGE the Third, by the Grace of G O D, of
 " Great Britain, France, and Ireland, King, defender of the
 " faith and so forth, To (commissioners) Greeting. Where-
 " as M. B. complainant, hath lately exhibited his bill
 " of complaint before us, in our court of Chancery against
 " C. D. defendant. And whereas we have by our writ
 " lately commanded the said defendant to appear before
 " us, in our said Chancery, at a certain day now past, to
 " answer

“ answer the said bill. Know ye that we have given unto
 “ you, any three or two of you, full power and authority,
 “ to take the answer of the said defendant to the said bill;
 “ and therefore, we command you, any three or two of
 “ you, that at such certain day and place as you shall think
 “ fit, you go to the said defendant, if he cannot convenient-
 “ ly come to you, and take his answer to the said bill * *on his*
 “ *corporal oath upon the holy Evangelists, to be administred by*
 “ *you, any three or two of you, the said answer being plainly*
 “ *and distinctly written upon parchment, and when you*
 “ *shall have so taken it, you are to send the same closed*
 “ *up, under the seals of you, any three or two of you,*
 “ *unto us in our said court of Chancery (without delay,*
 “ *insert return) wheresoever it shall then be, together*
 “ *with this writ. Witness Ourself at Westminster*
 “ day of in the year of our Reign

Sewell, Winter.

Indorsed by the court.

Label, To (insert commissioners) any three or two of them
 a commission to take the answer of C. D. defendant
 at the suit of M. B. complainant, returnable (with-
 out delay insert return) on six days notice to said
 (the plaintiff's commissioner to whom the notice
 is to be given).

Sewell, Winter.

If the *dedimus* issue *ex parte*, the notice in the label is to be omitted.

An ordinary commission to take a Quaker's answer.

“ G E O R G E the Third &c. To (insert commis-
 “ sioners) Greeting. Whereas A. B. complainant, hath

* If the defendant be a Peer, or Peerefs of the realm, instead of the Italic characters in the body of the writ, insert the words (*upon his honour*) or if the defendant be a Jew, the words *upon the sacred Pentateuch or five books of Moses*: and the label is made accordingly.

“ lately

“ lately exhibited his bill of complaint before us, in our
 “ court of Chancery, against *C. D.* defendant. And
 “ whereas, we have by our writ lately commanded the
 “ said defendant to appear before us in our said Chancery,
 “ at a certain day now past, to answer the said bill : but
 “ forasmuch as the said *C. D.* is one of the dissenters
 “ commonly called Quakers, as is alledged — Know ye
 “ therefore that we have given unto you, any three or two
 “ of you, full power and authority to take the answer of
 “ the said defendant to the said bill, upon his solemn
 “ declaration and affirmation, to be made before you,
 “ any three or two of you, according to the form and
 “ tenor of the statute in that case made and provided §.
 “ Therefore we command you, any three or two of you,
 “ that at such certain day, and place, as you shall think
 “ fit, you go to the said defendant &c.” (*The conclusion is
 as in the writ beforementioned.*)

An ordinary *dedimus*, to take the answer of a corporation.

“ *G E O R G E* the third, &c. To (*insert commif-*
 “ *sioners*) Greeting. Whereas *A. B.* complainant hath
 “ lately exhibited his bill of complaint against *C. D.* defend-
 “ ants, and whereas we have by our writ commanded the said
 “ defendants to appear before us in our said Chancery, at
 “ a certain day, now past, to answer the said bill : but
 “ forasmuch as the said *C. D.* are a body corporate, and
 “ ought, and have been accustomed to put in their answer,
 “ by a general consent. Know ye that we have given
 “ unto you, any three or two of you, full power and au-
 “ thority to take the answer of the said defendants to the
 “ said bill under the common seal of the said corporation,

§ If there be another defendant not a Quaker, insert, *And
 the answer of the other defendant to the said bill, on his corporal
 oath upon the holy Evangelists, to be administered by you, any three
 or two of you.*

“ and

“ and therefore we command you, any three or two of
 “ you, that at such certain days and places as you shall
 “ think fit, you go to the said defendants, if they cannot
 “ conveniently come to you, and take their answer to the
 “ said bill, under their common seal, the said answer (as
 “ in the precedent before.)

To each of these writs the Master of the Rolls and Six clerks names are subscribed, and also upon the label, and generally the Clerk in court's name, in order to point out the Clerk to whom it belongs.

The defendant's Clerk in court gives this writ to the Bagbearer of the office, to be sealed; who afterwards leaves it at the respective clerk's seat in the Six clerk's office, for which six pence is paid at a common seal, and three shillings and six pence extra at a private seal. The commission, thus completed, is to be sent to the defendant's Solicitor, or agent in the country, to be executed; who, according to the directions on the label, must give six days notice to the plaintiff's commissioner (as is therein specified) of executing the commission, which notice may be in the following form:

“ We whose names are hereunto subscribed, having
 “ received a commission, issuing out of the high court of
 “ Chancery, to us and others directed, to take the answer
 “ of *C. D.* defendant to the bill of complaint of *A. B.*
 “ gent. complainant, in a cause depending in the said
 “ court. We do hereby give you notice, that we intend
 “ to execute the said commission on *Wednesday* the *twen-*
 “ *tieth* day of *May* instant, between the hours of *twelve* and
 “ *one* in the afternoon, at the house of *W. G.* situate in
 “ *Middlewich* in the county of *Chester*, at which time and
 “ place you may be present, if you please, to see the same
 “ taken. Given under our hands the *fourteenth* day of
 “ *May*, 1783.”

To Mr. *R. Lecke*,
 Plaintiff's commissioner. }

Thomas Parrott.
John Harris.

If the commission issue *ex parte* no notice is given.

One

One commissioner attending on each side is sufficient for the purpose of taking the defendant's answer, and returning the commission; but in case none of the plaintiff's commissioners attend, the defendant must have two commissioners to attend to take his answer, because no fewer than two can take the answer, and return the *dedimus*.

The defendant's Solicitor having prepared his answer, and ingrossed it upon parchment, with an half crown stamp to each skin: On the day appointed the commissioners meet, and the defendant, accompanied by his Solicitor, attends them, with his answer prepared for swearing; one of the defendant's commissioners opens the commission, and interrogates the defendant in the following manner:

"Have you heard this your answer read, and do you exhibit it as your answer to the bill of complaint of

"To which the defendant answering in the affirmative: one of the commissioners administers this oath to the defendant, laying his right hand on the *Bible*, or *New Testament*, You shall swear, that what is contained in this your answer, as far as concerns your own act and deed, is true of your own knowledge, and that what relates to the act and deed of any other person or persons you believe to be true."

So help you God.

(The same oath is administered, when an answer is sworn in town at the publick office).

The defendant signs his answer in the presence of the commissioners *. And the answer, thus taken, is to be annexed to the commission, and the commissioners write the caption at the foot of the answer. Thus:

This (plea and) answer was taken, and the abovementioned C. D. the defendant was duly sworn to the truth thereof, on the holy Evangelists, (and the demurrer of the said defendant was taken without oath,) at the house of W. G. situate

* Vide Page 199. Lord Hardwicke's order, 1748.

in Middlewich in the County of Chester, on the twentieth day of May, in the twenty-third year of the reign of his Majesty King George the Third, and in the year of our Lord, one thousand seven hundred and eighty three, by virtue of the commission hereunto annexed before us,

Thomas Parrot.

John Harris.

The caption of a Quaker's answer.

This answer was taken upon the solemn affirmation of the said at, &c.

The caption of the answer of a corporation temporal.

This answer of the above named defendants, the Mayor, Aldermen, and Common Council of the city of Chester, was taken under the common seal of the said corporation, as by the said seal affixed appears at, &c.

The caption of the answer of a spiritual corporation.

This answer of the above named defendants, the Dean and Chapter of the cathedral church of Chester was taken under the common seal of the said Dean and Chapter, as by the said seal affixed appears at, &c.

The caption of a Peer's answer.

This answer was taken upon the attestation of honour of the above named defendant, the earl of at, &c.

The above caption of the defendant's answer is to be properly varied, according to the nature of the thing to be sworn to, whether an answer, plea and answer, &c. and being subscribed by two of the commissioners, they indorse on the commission their return thereof, thus :

The execution of this commission appears in a certain schedule or schedules (if more than one skin) hereunto annexed.

Thomas Parrott.

John Harris.

The

The commissioners should be precise in the caption of the answer. The joint and several answers of two defendants was on motion suppressed for irregularity, because it was under written, *sworn* only, and not *both sworn*. *Mof.* 238.

If there be schedules, they are all to be annexed to the commission; and then the commissioners are to fold up the commission, binding it round with tape, and putting their names and seals thereto, and to direct it to the defendant's Clerk in court. If one of the commissioners bring the answer to the Clerk in court, and deliver it sealed, as aforesaid, into the hands of the Clerk in court, or of his agent, at his seat in the Six clerks office, it is always accepted without oath, and indorsed thus:

1 June 1783. *Received by the hands of Thomas Parrott, one of the commissioners.*

When the answer, sealed up, is sent by a messenger, or any person not a commissioner, the defendant's Clerk in court takes him to the publick office to be sworn before one of the Masters, where he swears *That he received the commission from the hands of one or more of the commissioners therein named, and that it has not been opened nor altered since he so received it.*

And the indorsement then is,

1 June 1783. *Upon the oath of A. B. (the person bringing it) at the publick office before*

One shilling is to be paid for the oath, and the answer left at the publick office, and notice given to the Clerk in court, or the Clerk in court, if he goes with the party who brings it, after the party is sworn, generally takes it away to the Six clerk's office, and opens it; after which he enters it in his cause book, annexes it to the bill, marks it at the top with the day and year when filed, and subscribes his name at the bottom on the left side; he then files the answer with his Six-clerk, of which he informs the plaintiff's Clerk in court, who goes into his Six-clerk's study (it being by the defendant's Six clerk trans-

mitted

mitted thither) and takes it from thence, first making an entry thereof in the Six-clerk's book: but if the answer of another defendant to the same bill be filed before, he then proceeds as aforesaid, but in such case he does not annex the answer to the bill, he writes at the foot of the answer—*Bill with another answer to A. i. e. the plaintiff's* Six-clerk, *filed such a term with B. i. e. the defendant's* Six-clerk.

When the defendant is advised to plead and answer, or demur and answer, or to demur plead and answer, an order for a special *dedimus* must be obtained by motion in court, or petition to the Master of the Rolls, as before directed; a copy of the order being served upon the plaintiff's Clerk in court, and the original order left with the defendant's Clerk in court; commissioners names are to be applied for and obtained in the same manner as for an ordinary *dedimus*, and the order gives the defendant liberty to take his commission *ex parte*, unless plaintiff gives commissioners names in two days.

The form of a special *dedimus* is as follows :

“ *G E O R G E* the Third, by the Grace of G O D, of
 “ *Great Britain, France, and Ireland, King, Defender of the*
 “ *Faith, and so forth, To (insert commissioners) Greeting.*
 “ Whereas *A. B.* complainant hath lately exhibited his
 “ bill of complaint before us, in our court of Chancery
 “ against *C. D.* defendant, and whereas we have by
 “ our writ lately commanded the said defendant to appear
 “ before us in our said Chancery, at a certain Day now
 “ past, to answer the said bill, * *Know ye, that we have given*
 “ unto

* If defendant be a Quaker the words in Italic are to be omitted, and the following clause inserted :

— “ But soasmuch as the said *C. D.* is one of the dissenters
 “ called Quakers, as is alledged, Know ye therefore that we have
 “ given unto any three or two of you full power and authority,
 “ in pursuance of the special order of our said court, to take
 “ the answer of the said defendant to the said bill upon his so-
 “ lemn

Infants, idiots, and lunatics, who are incapable by themselves of instituting a suit, are likewise *incapable* by themselves of defending one. Infants institute a suit by their next friend, but to defend a suit the court appoints them *guardians*, who are usually their nearest relations not concerned in point of interest in the matter in question. If an infant defendant reside within twenty miles of *London* (which is a *town cause*), the guardian is appointed in court upon a personal attendance of the parties, if above twenty miles (*viz.* in a *country cause*), the guardianship is appointed by commission. In a *town cause*, the infant having entered an appearance, the guardian may be appointed any day in term or vacation; in court by the Lord Chancellor, or by the Master of the Rolls. The infant, and the party intended to be appointed guardian, personally attending, the Clerk in court for the infant prepares a note in writing, containing the title of the cause, and praying that *C. D.* (naming the person) may be appointed guardian to *A. B.* the infant, by whom he may answer and defend the suit. This note the Clerk in court delivers to and leaves with the Register, who takes an opportunity of mentioning it to the court, or to the Master of the Rolls, if the application be at the Rolls; and the person offering himself as guardian appearing, upon examination, to be a proper person, the appointment is made of course. The Register who attended that day on which the appointment was made, will, upon application, draw up and pass the order, which is to be entered and served upon the adverse Clerk in court, like other orders of course. Where the infant neglects to appear, or to have a guardian assigned him, it is a motion of course (he being in contempt to an attachment) to move for a messenger to bring him into court, and when he is brought there, if no person offer to be guardian, the court usually assign the senior Six clerk, not towards the cause to be guardian: by whom the infant may answer, and defend the suit. By this guardian the infant puts in a demurrer, plea or answer; for without the guardian, the defence would be irregular, and the plea or
answer

answer is always upon the oath of the guardian, who is liable to costs if the answer be reported scandalous or impertinent, and sometimes the guardian is ordered or decreed to perform a duty on behalf of the infant, which if he refuse or neglect to do, will subject him to the censure of the court; the answer of an infant by guardian is not admitted as evidence against the infant when he arrives at majority, because the infant might have been of such tender years when the answer was put in as to have been incapable of judging for himself. The language of a decree made upon an infant's answer imports that the decree is to be binding upon the infant, unless he shall in six months after he shall attain twenty-one years (being served with process for that purpose) shew unto the court good cause to the contrary: and the cause may be shewn by amending the infant's answer put in by guardian, after the infant has attained twenty one, yet such decree *nisi* is deemed an absolute decree, and not to be impeached by *original bill* unless fraud or collusion &c. can be proved between the plaintiff and guardian, and an amendment of the answer by stating the fraud or collusion, or both, will be good cause why the decree should not be made absolute.

The *jurata* of an infant's answer by guardian states the order for appointing the guardian, and runs thus,

*Sworn at the public office in Symonds Inn this day
of 1784, by A. B. guardian of C. D. the
infant, pursuant to an order dated the day of
before me.*

I. Ord.

If the answer be taken without oath, which may be, and frequently is, done by consent upon motion or petition; the order made thereon must be drawn up, passed, and entered, and left with the defendant's Clerk in court (for without the order the answer cannot be filed) the record is then inscribed,

"Without oath by order dated the day of 1784."

R

The

The other formalities are *mutatis mutandis* the same as in putting in the answer of a party in no wise incapacitated.

When the infant and guardian reside above twenty miles from *London*, and the answer is to be taken without oath; or if the guardian reside in *London*, and the infant in the country, in either of these cases a commission to assign a guardian only will be sufficient, because, in the one case, the oath may be dispensed with by order, and in the other, the guardian may swear to his answer at the public office; for although the infant must be brought before the commissioners to have a guardian assigned, the personal attendance of the guardian may be, and generally is, dispensed with. When the infant and guardian both reside above twenty miles from *London*, and the answer is to be put in upon oath, an order must be obtained for a commission to assign a guardian, and to take the answer of the infant by such guardian.

These writs cannot be made out by the Clerk in court, without an order first obtained for that purpose. The order is made of course upon motion or petition, and being drawn up, passed, entered and served * like other orders of course; the original order is to be left with the defendant's Clerk in court with commissioners names to insert in the commission: the plaintiff's Clerk in court, when called upon for commissioners names, usually gives them to defendant's Clerk in court, with directions to whom of them notice of executing the commission is to be given, or in default the commission may be made out *ex parte*. All the commissioners names are to be inserted in the writ; the form whereof is as follows.

A *Dedimus* to assign a guardian only.

“ *GEORGE* the Third, by the Grace of GOD,
“ of Great Britain, France, and Ireland, King, defender of

* A *dedimus* to assign a guardian only, is always made out *ex parte*, and the order is not served.

“ the faith, and so forth. To (*insert commissioners*) Greeting. Whereas *A. B.* complainant hath lately exhibited his bill of complaint before us in our court of chancery against *C. D.* defendant; but forasmuch as the said *C. D.* is an infant under age, and cannot defend this suit without having a guardian assigned in that behalf: Know ye therefore, that we have given unto you, any three or two of you, full power and authority, in pursuance of the special order of our said court, to assign and appoint a guardian for the aforesaid infant; and therefore we command you, any three or two of you, that at such certain day and place as you shall think fit, you go to the said defendant, if he cannot conveniently come to you, and assign and appoint a guardian for the aforesaid infant, and when you shall have so done, you are to send, closed up, a certificate of your having assigned and appointed such guardian as aforesaid, and this writ unto us in our said Chancery (*without delay or other return*) wheresoever it shall then be. Witness Ourself at *Westminster* this day of in the year of our reign.”

Sewell, Sewell.

Indorsed By order of Court.

Label, To (*insert commissioners*) any three or two of them, a *dedimus* to assign a guardian for *C. D.* an infant defendant to answer at the suit of *A. B.* complainant, returnable (*without delay.*)

Sewell, Sewell.

A commission to assign a guardian, and to take the infants answer by such guardian.

“ *G E O R G E* the Third, by the Grace of *G O D*, of Great Britain, France, and Ireland, King, defender of the faith, and so forth. To (*commissioners*) Greeting. Whereas *A. B.* complainant hath lately exhibited his bill of complaint before us in our court of chancery, against *C. D.* defendant, and whereas we have by our

“ writ lately commanded the said defendant to appear be-
“ fore us in our said chancery at a certain day now past
“ to answer the said bill ; but forasmuch as the said *C. D.* is
“ an infant under age, and cannot answer the said bill,
“ nor defend this suit without having a guardian assigned in
“ that behalf : Know ye therefore, that we have given unto
“ you, any three or two of you, full power and authority,
“ in pursuance of the special order of our said court, to
“ assign and appoint a guardian for the aforesaid infant, and
“ to take the answer of the said infant by such guardian
“ to the said bill ; and therefore we command you, any
“ three or two of you, that at such certain day and
“ place as you shall think fit, you go to the said defendant,
“ if he cannot conveniently come to you, and assign and
“ appoint a guardian for the aforesaid infant, and take the
“ answer of the said infant by such guardian to the said
“ bill, on such guardian’s corporal oath upon the holy Evan-
“ gelists, to be administered by you, any three or two of
“ you, the said answer being distinctly and plainly written
“ upon parchment ; and when you shall have so taken the said
“ answer, you are to send the same closed up under the seals
“ of you, any three or two of you, together with your
“ certificate of your having assigned and appointed such
“ guardian as aforesaid, and this writ, unto us in our said
“ chancery (*insert return*) wheresoever it shall then be.
“ Witness Ourself at *Westminster* this day of in the
“ year of our reign.

Sewell, Winter.

Indorsed *By order of Court.*

Label, *To (insert commissioners) any three or two of them, a commission to appoint a guardian for and take the answer of C. D. an infant defendant at the suit of A. B. returnable (without delay) on six day's notice to **

Sewel, Winter.

* The plaintiff's commissioner, to whom notice is directed to be given. A com-

A commission to take a plea, answer, or demurrer of an infant by his guardian already assigned.

“ *GEORGE* the Third &c. To (*commissioners*)
 “ Greeting. Whereas *A. B.* complainant hath lately ex-
 “ hibited his bill of complaint before us in our court of
 “ chancery against *C. D.* defendant, and whereas we have
 “ by our writ lately commanded the said defendant to
 “ appear before us in our said chancery at a certain day
 “ now past to answer the said bill, and whereas the said
 “ *C. D.* is an infant and hath a guardian already assigned
 “ him: Know ye, that we have given unto you, any three or
 “ two of you, full power and authority, in pursuance of the
 “ special order of our said court, to take the plea, answer,
 “ or demurrer of the said infant to the said bill by his
 “ guardian already assigned; and therefore we command
 “ you, any three or two of you, that at such certain day
 “ and place as you shall think fit, you go to the said de-
 “ fendant, if he cannot conveniently come to you, and take
 “ the answer of the said defendant by his guardian already
 “ assigned to the said bill, on such guardian’s corporal oath
 “ upon the holy Evangelists, or his plea on such guardian’s
 “ corporal oath, to be administered by you, any three or
 “ two of you, or his plea or demurrer without oath to be
 “ respectively made to the said bill, the said answer, plea,
 “ or demurrer being distinctly and plainly written upon
 “ parchment; and when you shall have so done, you are
 “ to send the same closed up under the seals of you, any
 “ three or two of you, unto us, in our said chancery (*insert*
 “ *return*) wheresoever it shall then be, together with this
 “ writ. Witness &c. *Sewel, Winter.*

Indorsed *By order of Court.*

Label *To (commissioners) any three or two of them, a com-
 mission to take the plea, answer, or demurrer of C. D.
 an infant by his guardian already assigned, at the suit of
 A. B. complainant returnable (return) on six days
 notice to § Sewell, Winter.*

§ The plaintiff’s commissioner, to whom notice is directed to be given.

A commission to assign a guardian for an infant, the guardian formerly assigned being dead.

“ *GEORGE* the Third, &c. To (*commissioners*)
 “ Greeting. Whereas *A. B.* complainant hath lately ex-
 “ hibited his bill of complaint before us in our court of
 “ chancery against *C. D.* defendant, and whereas we have
 “ by our writ commanded the said defendant to ap-
 “ pear before us in our said chancery at a certain day
 “ now past to answer the said bill; but forasmuch as the
 “ said defendant, being an infant under age, could not
 “ answer the said bill, nor defend this suit, without hav-
 “ ing a guardian assigned in that behalf, a commission
 “ issued out of our said court for assigning him a guardian
 “ for that purpose; and he accordingly *put in his answer*
 “ by *J. W.* his guardian (who is since dead): Know ye
 “ therefore, that in pursuance of an order of our said
 “ court, dated the — day of — we have given unto you,
 “ any three or two of you, full power and authority to
 “ assign a new guardian for the afore said defendant the
 “ infant, by whom he may defend this suit. And therefore
 “ we command you, any three or two of you, that at
 “ such certain day and place as you shall think fit, you go
 “ to the said defendant, if he cannot conveniently come
 “ to you, and assign and appoint a guardian for the said
 “ defendant the infant; and when you shall have so done,
 “ that you certify the name of such guardian, and your
 “ having assigned and appointed such guardian, fairly and
 “ distinctly written upon parchment, and send the same
 “ closed up under the seals of you, any three or two of
 “ you, unto us in our said Chancery (*inset return*) where-
 “ soever it shall then be, together with this writ. Wit-
 “ nesses Ourselves at *Westminster*, &c. *Sewell, Zincke.*

Indorsed By order of Court.

Label To (*commissioners*) any three or two of them, a *de-
 dinus* to assign a guardian for *C. D.* defendant (the
 former guardian being dead) at the suit of *A. B.*
 complainant, returnable *without delay*.

The surnames of the Master of the Rolls, and of the Six-clerk in whose division the commission is made out, are respectively subscribed to these writs.

To appoint a guardian only, to an infant by commission; the defendant's Solicitor leaves with his Clerk in court, commissioners names to be inserted in the commission, which is made out by him *ex parte*, and, when sealed, is sent by the Clerk in court to the Solicitor, who acquaints the commissioners with the nature of the commission, and settles with them the time and place of executing it; two of the commissioners must attend at the time and place appointed to open the commission, and the infant being personally produced before them, and the person proposed as guardian upon enquiry appearing to be a proper person, the commissioners appoint such person to be guardian to the infant, to answer and defend the suit on his behalf: a certificate of the appointment must be ingrossed upon parchment, with an half-crown stamp, and annexed to the commission; the form whereof is as follows:

"In Chancery

Between

A. B. Plaintiff.

C. D. Defendant.

"To the right honourable the Lord High Chancellor of
"Great Britain.

"We whose names are hereunto subscribed, in pursuance of a commission to us and others directed, have caused C. D. the infant to come before us, who chose Sir J. C. of Agdon in the county of Chester, Bart. to be his guardian, to defend this suit on his behalf, and we have assigned and appointed the said Sir J. C. to be his guardian accordingly, at the house of — in Rostherne in the county of Chester, on the 4th day of November 1783, by virtue of the commission hereunto annexed.

R 4

R. S.

T. C.

This

This certificate being annexed to the commission, the following return is indorsed upon the commission, and subscribed by the commissioners.

The execution of this commission appears in a certain schedule hereunto annexed.

PH
MVSEVM
BRITANNICVM

R. S.

T. C.

The commission, with the certificate annexed, is to be sent to the defendant's Clerk in court, at the Six-clerk's office, and the appointment of the guardian is then complete.

When the *infant* resides in the country, and the *guardian* in town, and the infant's answer by guardian is to be put in upon oath, the appointment of the guardian is thus made, and the answer being ingrossed upon parchment, with the usual stamps, the guardian must attend at the publick office with the certificate, and swear to the contents of his answer: the following *jurata* is then inscribed in the usual manner:

*Sworn this — day of — 1784, by Sir J. C. Bart.
guardian of the said C. D. the defendant assigned,
pursuant to a certificate dated the — day of — at the
publick office in Symond's Inn, before*

J. Eames.

Every answer, when sworn, is left at the publick office, until the defendant's clerk in court takes it away to file, upon notice given by the Solicitor. The answer of the guardian when brought into the Six-clerk's office is to be annexed to the commission and certificate of appointing the guardianship, and filed therewith, as in ordinary cases.

Where the *infant* and *guardian* both reside above 20 miles from *London*, and at a great distance from each other, and cannot conveniently meet together, and the guardian's oath to the infant's answer is dispensed with, by or-

der (obtained after the guardian is appointed) the answer properly ingrossed being brought to the defendant's Clerk in court to file, accompanied with the order for taking the answer without oath, the date and import of the order the Clerk in court inscribes on the record; the certificate of appointing the guardian is annexed to the answer, which is filed of course. Or if the infant and guardian are circumstanced as before mentioned, and the infant's answer by his guardian is to be put in upon oath, the guardian may be appointed by commission, to assign a guardian only, and after the certificate of such appointment is returned to the office, the answer of the guardian may be taken in the country under a commission to take the infant's answer by his guardian already assigned, and the caption of the answer may run thus :

This answer was taken, and the above-named Sir J. C. Bart. as guardian already assigned to the said C. D. the infant, was duly sworn to the truth thereof upon the holy Evangelists, at the house of — in Agdon, in the parish of Rostherne, in the county of Chester, on the 10th day of December, 1783, by virtue of the commission hereunto annexed before us,

T. C.

E. W.

In cases where the infant and guardian both reside in the country, and can conveniently meet, a commission to appoint a guardian, and to take the answer of the infant by such guardian, is the usual method of proceeding: To effect this, the defendant's Solicitor, after service of the order for a commission, leaves with his Clerk in court commissioners names to insert in the writ; the plaintiff's Clerk in court, when called upon, names commissioners in the usual manner; the writ sealed, is sent by the defendant's Clerk in court to the Solicitor; six days notice of executing the commission is to be given to the plaintiff's commissioner,

fioner, as by the label of the writ is directed (unless it issue *ex parte*) the commissioners and parties having met, the appointment of the guardian is made in like manner as under a commission to appoint a guardian only; the guardian, after his appointment, exhibits his answer on behalf of the infant, and being duly affirmed or sworn by the commissioners to the truth of it, a certificate of the appointment of the guardian, and the caption of the answer by such guardian, is written at the foot of the answer, and subscribed by two of the commissioners (or three if the defendant's commissioner attend) in the following form :

To the Right Honourable the Lord High Chancellor of Great Britain.

We whose names are hereunto subscribed, in pursuance of the commission hereunto annexed, to us and others directed, did cause C. D. the infant in the said commission named, to come before us, who chose Sir J. C. Bart. to be his guardian, to answer and defend this suit on his behalf; and we have assigned the said Sir J. C. Bart. to be his guardian accordingly, and the said Sir J. C. Bart. at Agdon, in the parish of Rostherne, in the county of Chester, was this 10th day of July, 1783, sworn upon the holy Evangelists to the truth of the answer of the said C. D. as his guardian, by virtue of the said commission before us.

T. H.
R. V.

The commissioners subscribe their names to the caption and certificate, and annex the answer to the commission, the return being indorsed on the commission, and subscribed by the commissioners, the whole is folded up and bound round with tape (the commissioners setting their seals thereon) and sent to the defendant's Clerk in court in the Six-clerks office: the formalities attending the carriage and filing the answer, are precisely the same as in the ordinary cases of answering by commission, and in the preceding pages of this work particularly described and set forth.

A per-

A person reduced by age or infirmity to a second infancy, may defend by guardian *; in this case a special application should be made by motion or petition on affidavit, stating the particular circumstances of the party, and praying a commission to appoint a guardian. The distinction between a town and country cause, seems not to affect a commission for this purpose, which may be executed any where. The order for the commission being drawn up, passed and entered, commissioners names must be left with the defendant's Clerk in court, to be inserted in the commission, which in no case differs from the form of a commission to appoint a guardian to an infant, except in stating that the party is incapable by age or infirmity, and the proceedings under a commission of this kind are, *mutatis mutandis*, the same as in executing a commission to appoint a guardian to an infant.

The following certificate of appointing the guardian, is made in the usual manner :

“ In Chancery.

Between *J. Pegg*, plaintiff,
S. Skinner and *W. Richardson*, defendant,

“ To the Right Honourable the Lord High Chan-
“ cellor of *Great Britain*.

“ We whose names are hereunto subscribed, humbly
“ certify unto your Lordship, that by virtue of the com-
“ mission annexed, we have called before us the defend-
“ ant *William Richardson* therein named, and have assigned
“ and appointed *John Holmes* of ——— to be his guar-
“ dian, by whom he may answer and defend this suit.
“ Witness our hands this ——— day of ———, 1783.

J. S.

J. K.

* Preced. in Ch. 329.

The following *jurata* is inscribed upon the answer :

Sworn this ——— day of ——— 1783, by *John Holmes*, the guardian of the defendant, pursuant to a commission dated the ——— day of ———, and a certificate dated the ——— day of ———, at the public office before me, *J. Ord.*

Idiots and lunatics defend by the committees of their estates. If a suit be instituted against an idiot or lunatic, the committee of his estate generally applies by motion or petition to be appointed guardian, to answer and defend the suit, which is ordered of course : the guardianship being rarely or never assigned by commission, as in other cases.

In a town cause, the guardian is sworn to his answer at the public office in like manner as a guardian to an infant. In a country cause the answer is taken by commission.

A commission to take a lunatic's answer by his committee.

“ *GEORGE* the Third, &c. To (*insert committee*)
 “ greeting : Whereas *A. B.* complainant, hath lately exhibited his bill of complaint before us, in our court of
 “ Chancery, against *C. D.* defendant ; and whereas we
 “ have by our writ lately commanded the said defendant
 “ to appear before us in our said Chancery, at a certain
 “ day now past to answer the said bill ; but forasmuch
 “ as the said *C. D.* is a *lunatic*, and cannot answer this
 “ bill, nor defend this suit, but by his committee assigned
 “ him in that behalf : Know ye therefore, that we have
 “ given unto you, any three or two of you, full power
 “ and authority, in pursuance of the special order of our
 “ said court, to take the answer of the said *C. D.* a *lunatic*,
 “ by *E. F.* his committee, already appointed him by our
 “ said court to the said bill : and therefore we command
 “ you,

“ you, any three or two of you, that at such certain day
 “ and place as you shall think fit, you go to the said de-
 “ fendant, if he cannot conveniently come to you, and
 “ take the answer of the said defendant by the said *E. F.*
 “ his committee already assigned and appointed to the said
 “ bill, *on the corporal oath of the said committee upon the holy*
 “ *Evangelists*, to be administered by you, any three or two
 “ of you, the said answer being plainly and distinctly writ-
 “ ten upon parchment; and when you shall have taken
 “ the said answer, you are to send the same closed up under
 “ the seals of you, any three or two of you, and this writ,
 “ unto us in our said Chancery (*return*) wheresoever it
 “ shall then be. Witness Ourself at *Westminster*, the ———
 “ day of ———, in the ——— year of our reign.

Sewell, Sewell.

Indorsed, *By order of Court.*

Label. *To (insert commissioners) any three or two of them, a
 commission to take the answer of C. D. a lunatic, by
 his guardian already assigned, at the suit of A. B.
 complainant, returnable (return) on six days notice
 to said ——— *.*

Sewell, Sewell.

The proceedings under this commission are *mutatis mu-
 tandis*, as in the case of an infant answering by guardian.

If the party who has the carriage of any commission,
 gives notice of executing it, but does neither countermand
 notice in due time (as three or four days before the time,
 or as the distance of the place &c. may require) nor execute
 it at the time; the court, on motion, will order costs to be
 taxed for the adverse party's attendance.

Notice being given of executing a commission; the plain-
 tiff's commissioners attended at the place, and day, from
 nine till twelve, and from one till three, and the defendants

* Plaintiff's commissioner, to whom notice is directed to be given.
 commis-

commissioners came not : and yet the answer was sworn the same day : the plaintiff moved therefore that the answer might be suppressed ; the court said his commissioners should have staid till six o'clock. *Prac. Reg.* 79.

Upon a motion to suppress an answer, because one of the commissioners, who took it, was an attorney's clerk under age, the court said, if he be old enough to take an oath, he is old enough to be a commissioner, to receive an answer. *Prac. Reg. ut supra.*

No second commission is to be granted without special order of court upon good reasons to induce the same ; or upon the plaintiff's own assent. *Ord. Canc.* 99. After a contempt duly prosecuted to an attachment with proclamations returned, no *dedimus* is to go without motion.

If a *feme covert* claim in opposition to any claim of her husband, or if she lives separate from * him or disapproves the defence he wishes her to make †, she may obtain an order for liberty to defend the suit separate from her husband, and the order putting her in a capacity to defend alone, must be drawn up, passed, entered, and served upon the adverse party, and left with her Clerk in court before any proceeding can be taken by her separately from her husband. 2 *Wms.* 371.

Of Referring Answers for Scandal, &c.

A Bill, answer or any pleading *scandalously* reflecting upon any party in the suit or otherwise, or *impertinently* reciting matter altogether unnecessary and not *relevant* to the point in question, upon application by motion of course, will be referred to a Master to look into such pleading, and certify whether the same be scandalous or not. The order of reference drawn up, passed, entered, and served on the adverse Clerk in court is to be carried to

* Preced in Chan. 329.

† 2 *Atk.* 50.

the Master's office, to whom the reference is made ; upon producing the order, the Master's Clerk will give out a warrant, usually appointing an attendance the day next but one from the day on which the warrant is taken out. This warrant is to be served upon the adverse party, by leaving a copy thereof with his Clerk in court personally, or with the Agent at the Clerk in court's seat in the Six clerk's office : if the opposite party do not attend the Master after service of three warrants, an affidavit of service must be made, and the Master will proceed *ex parte* *. The office copy of the record referred must be brought by the Solicitor to the Master's office at the time appointed, and the opposite Solicitor attending the Master inspects the pleading and the clauses objected to as scandalous or impertinent. Sometimes council attend, (and generally he who signed the pleadings) and suggest to the Master their reasons why the matter is or is not scandalous or impertinent, and not *relevant*. After the argument on both sides, the Master exercises* his opinion, whether there be scandal or impertinence in the record, or not, and certifies the same to the court. The certificate is in the nature of a report, but requires no application to the court, for confirmation. Objections cannot be brought in to a certificate or report which requires no confirmation, consequently no objections can lie to this certificate, or report. A party dissatisfied with the Master's judgment, may take the opinion of the court by filing exceptions to the report, and bring them on to be heard §.

If the plaintiff refer the answer for scandal and impertinence, and the Master find the answer neither scandalous nor impertinent, the plaintiff, on excepting to the Master's report, must in his exceptions shew wherein, in what line or page, and how far the answer is scandalous or impertinent, in order that such part of the answer may be

* One whole day must intervene between the day of service and the day for attending.—*Sunday* is no day.

§ *Vid.* next head, where exceptions are treated of at large.
expunged

256 Referring Answers for Scandal, &c.

expunged by the Master ; and it is not sufficient to say in general, that the answer is scandalous and impertinent. 2 *Wms.* 181.

And if a bill or answer be referred for scandal, and reported by the master to be scandalous, if the Master has once expunged the scandal, the party cannot then except to the report, because, when the scandal is expunged, it cannot be made appear by the record, what that scandal was, and it was the party's own fault that he did not except sooner. *Ib.*

The Master's certificate or report, signed by him, must be filed at the report office, and a copy thereof taken. If the Master certify that the record contains scandal or impertinence, or both, an application grounded on this certificate should be made to the court by motion of course, that the Master may expunge the scandal or impertinence, and tax the party his costs ; and this order being proceeded in as before, and a warrant taken out thereon and served, the Clerk in court who filed the record will, upon notice, take the record from the Six clerk's office, and attend and produce it at the Master's office in order that the scandal may be expunged, which is done by the Master, striking his pen through the words which are scandalous or impertinent, and setting his initials against the parts expunged.

The record thus purified is taken back from the Master to the Six clerks office by the Clerk in court. The *costs* abide the event of the reference. The party applying to have the scandal expunged, and to whom costs are ordered, after the record is reported scandalous or impertinent, leaves a bill of costs at the Master's office, and takes out and serves on the Clerk in court, a warrant on leaving his bill of costs, and another warrant to proceed thereon. After three warrants to proceed regularly served, if no person attend on the other side, the Master will proceed *ex parte*, the person who served them first making affidavit of the service. The report of costs being signed by the Master, and filed, the party recovers these costs by *sub-pœna* ; or if the Master reports the bill or answer, &c. not

not scandalous or impertinent, and the parties submit to his opinion, the party in whose favour the report is made, * may apply by motion of course, founded upon the report, for the Master to tax the costs of the reference, and when taxed, the party may recover them by the like process. To procure a *subpœna* for costs, the Solicitor leaves at the *subpœna* office a *præcipe* in the following form, producing the Master's report at the same time.

Subpœna Jervase Jones, Clerk, to pay five pounds costs to John Radcliffe, Esq; or bearer
tested 28 June, 1783.
Tilly Solicitor.

The form of the Writ.

"GEORGE the Third, &c. To Gervase Jones,
 " Clerk, Greeting. We command and strictly injoin you,
 " that you pay, or cause to be paid, immediately after the
 " receipt of this writ, to John Radcliffe, Esquire; or the
 " bearer of these presents, five pounds costs by our court of
 " Chancery adjudged to the said John Radcliffe, for his
 " costs, charges and expences, had and sustained in the
 " same court by means and occasion of your unjust vex-
 " ation; and this you may in no wise omit, under the
 " penalty of one hundred pounds. Witness Ourselves at
 " Westminster the twenty-eighth day of June in the twenty-third
 " year of our reign."

Courtenay and Courtenay.

Indorsed, by the Court.

Label, Jervase Jones, Clerk, to pay five pounds costs to John Radcliffe, Esq; or bearer.

Courtenay and Courtenay.

The gross sum at which the costs are liquidated, is specifically set forth in the body, and label of the writ,

* Ord. Canc. 94.

258 Referring Answers for Scandal, &c.

and always made payable to the party or bearer; the person serving the process must demand the costs, and his receipt will be a sufficient discharge. The service of the process must be *personal*, and an *actual* demand of the costs made at the same time; it cannot be served otherwise, without an order of court made on motion or petition (grounded on an affidavit that the party cannot be found to be served personally), and substituting a service by leaving the writ with the adverse Clerk in court or otherwise, and that to be good service if personally served. *Ord. Canc.* 95.

If the party refuse or neglect to pay the costs upon *personal* service, and *actual* demand, an affidavit of the *personal* service*, demand and refusal, being made by the party serving the process, and left with the Clerk in court, he will make out an attachment, and the whole line of process to enforce obedience, may be awarded.

A practice formerly obtained, in cases of scandal, for the Master to tax a gross sum, as fifty or an hundred pounds costs, at the foot of the bill of costs, *nomine pænæ*, to be paid by the council who signed the bill †, such practice, though in strictness regular, the present mode of proceeding seems to have rendered obsolete.

It may not be improper to observe, that a party appearing to a bill, and getting an order for time to answer, cannot afterwards refer the bill for impertinence, though he may for scandal. 2 *Wms.* 311. 1 *Ves.* 24. 631. *Cockran v. Wright, Rolls, Hil.* 1781.

* An affidavit stating a confession from the party, of his being served with a *subpæna* for costs, and not having paid them, has been held sufficient to issue process. *Ca. Rep.* 611.

† 1 *Ch. Rep.* 194.

EXCEPTIONS are allegations in writing, suggesting that some pleading or proceeding in a cause is insufficient, mistaken, or irregular, in certain points therein particularly expressed.

Exceptions are of two kinds, *viz.* to an answer, or to a Master's report.

If a plaintiff conceive an answer to be insufficient to the charges in the bill, he may take exceptions to it, stating such parts of the bill as he conceives are not answered, and praying that the defendant may in such respect put in a full answer to the bill.

The exceptions must shew some particular point wherein the answer is defective; upon a general suggestion of the insufficiency, the court will not refer it to be examined: or, if the answer be good to a common intent, the plaintiff must reply, and prove the matter of his bill to be true if he can, and not insist upon the insufficiency of the answer; this is intended of things publicly done, whereof there may be general cognizance; for of matters done by the defendant privately, or resting in his knowledge only, he ought to answer particularly and certainly.

Instructions, with copies of the bill and answer, should be laid before council to draw exceptions, which must in all cases be signed by council, before they can be filed; and great care should be taken in excepting to all the points not answered, for the insufficiency of the answer appearing on the exceptions is to be insisted on, and no new exceptions to be added ||. A transcript of the draught so signed, must be fairly ingrossed upon unstamped paper, and delivered to the defendant's Clerk in court personally, or left with his agent at his seat in the Six Clerks office; the exceptions are previously marked at the top of the ingrossment, with the day of the month and year when delivered, and this is termed *filing exceptions*.

If the defendant's answer be filed in term, the plaintiff must except to the answer the same term, or within eight days after. To an answer filed in vacation, the plaintiff has eight days in the beginning of the next term to except †. If he plaintiff do not file his exceptions in time, the defendant's Clerk in court sometimes will not receive them: in this case the plaintiff must obtain an order, upon motion or petition, for leave to file his exceptions, which is ordered of course, unless two terms have elapsed since the coming in of defendant's answer, and then the court will not indulge the plaintiff with leave to file exceptions, without some special cause assigned for the delay, as terms of accommodation, &c.

If an answer come in, in *Michaelmas* term, and the plaintiff does not take exceptions within eight days of *Hilary* term, upon applying to the court, he is, of course, intitled to take exceptions, provided he does it within two terms, the term in which he moves inclusive; but if he neglect to do it then, the court will not give leave, but upon particular circumstances. 3 *Atk.* 19. *Bernard.* 53.

No exceptions can be taken to an answer, after replication filed, for by the replication it is admitted sufficient; yet in some cases the court has ordered the replication to be withdrawn, and permitted exceptions to be filed. *Prac. Reg.* 170.

In an injunction cause, the plaintiff should file exceptions to the answer, before the defendant can have an opportunity of moving to dissolve the injunction *nisi*; for, although the plaintiff, on the day for shewing cause, shew exceptions to the answer for cause against dissolving the injunction, yet he will be put upon terms of procuring the Master's report, in four days, or the injunction will be dissolved without further order.

A defendant has eight days, after the plaintiff has filed his exceptions, to make his election, whether he will

† *Ord. Canc.* 101.

submit to answer them or not. A defendant is usually called upon, by the plaintiff's Clerk in court, to answer, after the eight days are expired, and if he submit to put in a further answer, the plaintiff's Clerk in court, generally calls for the answer, and gives notice of attachment if it be not forthcoming, &c. before the further answer is filed, defendant must pay to plaintiff twenty shillings costs. A defendant, residing in *London*, or within ten miles, (which is a town cause,) is intitled to an order, for a month's time to answer the exceptions; if he reside above twenty miles from *London*, he may obtain by motion, or petition, an order of course for a *dedimus*, to take his answer, and six weeks time to return it. An indulgence of any further time, seems to be in the discretion of the court; a very ordinary application, and an inattentive Solicitor, on the other side, will generally procure a second order, and not unfrequently a third order; however, the plaintiff is not without remedy: For if any gross delay has been practised upon him, he may move to discharge the order, for irregularity, due notice † to the adverse Clerk in court being previously given, and the court will discharge the order, or impose terms upon the defendant, the order for time in a town cause, and the *dedimus* and order in a country cause, ought regularly to be obtained, before the time for answering is out, and each subsequent order should be obtained and served before the preceding order, for time, has expired; in default an attachment may be issued.

A plaintiff cannot refer exceptions to a first answer, until eight days after they are filed, but upon a second insufficient answer they may be referred immediately.

It seems as if a party excepting to an answer is restricted to no particular time to get it referred, unless by special

† In all notices of motion, one whole day must intervene between the day on which notice is given, and the day for hearing. Sunday is no day in this proceeding.

order for that purpose obtained, or with respect to his injunction, lest it be dissolved for his affected delay. A defendant in such case may move to refer the exceptions, or if an order of reference has been obtained, he may proceed under it, and get rid of the exceptions *ex parte*, if the other side will not, upon due service of the order and warrants, attend the Master. *Prac. Reg.* 173.

Where a first answer, upon exceptions, longer than the bill, is reported insufficient, the defendant, if he submit to put in a further answer, without excepting to the report, is to answer all the points excepted unto, although the same exceed the charges of the bill, for by not excepting to the report, he has admitted, he ought to answer all the matters of exception. *1 Ch. Ca.* 60.

Where a defendant submits to answer in any stage of the suit, and the plaintiff obtains an order to amend his bill, and that the defendant may answer the exceptions and amendments at the same time, a defendant will be intitled to the three usual orders for time in a town or country cause, as the case is. If upon advising with council the defendant conceive his answer to be sufficient, an order of course must be procured upon motion or petition for a reference to a Master to look into the plaintiff's bill and defendant's answer, and the plaintiff's exceptions taken there-to, and certify whether the defendant's answer be sufficient in the points excepted to or not; (and a defendant in this stage, submitting to answer the exceptions, pays thirty shillings costs;) the order drawn up, passed and entered, at the Register-office, must be served upon the defendant's Clerk in court, and a fair copy of the exceptions left at the Master's office, to whom the reference is made; upon producing the order of reference, the Master's clerk will grant a warrant *upon leaving* the exceptions, and another warrant *to proceed*. Copies of these warrants must be served upon the adverse Clerk in court personally, or on his agent at the Six-clerk's office: each warrant should be underwritten with the matter to be proceeded on, and the defendant's
Solicitor

Solicitor must bespeak a copy of the exceptions left at the Master's office, or his attendance will not be allowed. The Solicitors on each side attending at the time and place appointed by the warrant, the order of reference is produced, and the Master, pursuant to the order, looks into the office copies of the bill and answer, and the exceptions, the Solicitors suggesting to him their reasons why the answer is or is not sufficient: sometimes council are retained to argue the exceptions before the Master, and generally those who signed the bill and answer respectively. When the defendant's Solicitor will not attend to justify his answer after three warrants to proceed served, and attendances had respectively at the times and places appointed by the warrants, the Master will proceed to make his report of the insufficiency of the answer according to the exceptions then before him; the person who served the warrants previously making oath of the service of them upon the defendant's Clerk in court *. This proceeding is termed an *ex parte* proceeding, and the report thus made states, that the Master hath been attended by the plaintiff's Clerk in court, or Solicitor (as the fact is), none attending for the defendant, though duly summoned (as by oath made before him appears) &c. The Master gives his opinion upon the exceptions as to the sufficiency or insufficiency of the defendant's answer, and certifies the same in a report to the court: the report, when signed by the Master, is taken away by the party in whose favour the report is made (paying 15 s.) and carried to the Report office to be filed; 4 d. is paid for filing; and if an office copy is necessary to be taken, 1 s. 6 d. is paid for the first side, and 1 s. for every other side. This report or certificate needs no further act of the court for

* The service of all warrants is upon the adverse Clerk in court personally, or on his agent, at his seat in the six Clerks office, leaving a copy, and producing the original. An interval of one whole day, between the day of service and the day of attendance, is sufficient.—Sunday is not reckoned one.—

confirmation, and consequently no objections to it can be brought into the Master's office.

In an injunction cause, where exceptions to the defendant's answer are shewn for cause against dissolving the injunction, and the party is put to procure the Master's report in four days (as is always done in such case), the exceptions must be left at the Master's as before, and the warrants served with all possible dispatch; service of a warrant in the morning is good service for the evening of the same day, because the plaintiff has but four days to procure the Master's report; and if he fail therein, the injunction is dissolved without further order. But in cases where the Master cannot finish his report in the four days, the Solicitors will sometimes agree, that the Master shall date his report as within the four days; or the Master, whenever he is directed by this or any other order to make his report within a limited time, may certify to the court, that the time is too short, and in that case the court gives so great credit to the report of the Master (which must be read on the motion) that they will allow such further time as the Master shall certify to be requisite. If the Master report the answer insufficient in any of the points excepted to, the defendant must answer again to those parts of the bill in which the Master conceives the answer insufficient, unless, by excepting to the Master's report, he brings the matter before the court, and there obtains a different judgment. An answer reported insufficient, and no exceptions taken to the report, subjects the defendant to the payment of 40 s. costs in a town cause, and 50 s. costs in a country cause, where the answer is returned by commission; and no new commission shall be awarded for taking a second answer without paying the costs of such insufficient answer. *Ord. Canc.* 102. For the recovery of these costs, and to compel the defendant to put in a further answer, the plaintiff immediately sues out a *subpœna* for costs*, and

* Vid. page 257. and *Ord. Canc.* 120.

serves the defendant *personally* therewith, and demands them : if he neglect, or refuse, payment on demand, on an affidavit of the service of the *subpæna*, and demand of the costs (which are always made payable to plaintiff, or bearer of the *subpæna*, and his receipt will be a sufficient discharge), the Clerk in court (the affidavit of service being left with him) will issue an attachment, and the whole line of process may be awarded, until the party is taken or obeys the writ. To oblige the defendant to put in a further answer to a bill, (when his answer is reported insufficient, and no exceptions taken to the report,) the plaintiff does not serve the defendant with a *subpæna personally* : service of a *subpæna to make a better answer*, upon a defendant's Clerk in court, is good service upon the defendant.

To procure this writ, a *præcipe*, in the following form must be left at the *Subpæna* office, and five Shillings if one or two defendants, and six pence for the additional label, when there are three defendants.

Subpæna Ralph Leycester, to appear in Chancery to make a better answer at the suit of *Peter Brooke* complainant, returnable immediate.

tested 15 March, 1783.

Tilly Solicitor.

The writ is in the following form.

A *Subpæna* to make a better answer.

“ *GEORGE* the Third, by the Grace of *GOD*, &c.
 “ to *Ralph Leycester*, Greeting. For certain causes offered before us, in our Chancery, We command, and
 “ strictly injoin you, that laying all other matters aside,
 “ and notwithstanding any other excuse, you personally
 “ be, and appear before us, in our said Chancery, *immediately after the receipt of this writ*, wheresoever it shall
 “ then be, to answer concerning those things which
 “ shall be then and there objected to you; and to do
 “ further, and receive, what our said court shall have
 “ considered

“ considered in this behalf: and this you may in no wise
 “ omit, under the penalty of one hundred pounds; and
 “ have there this writ. Witness Ourselves at *Westminster*,
 “ the tenth day of *April*, in the twenty-third year of our
 “ reign.”

Courtenay, and Courtenay.

Indorsed By the court to make a better answer, at the suit
 of *Peter Brooke*, complainant.

Label. *Ralph Leycester* to appear in Chancery immediately,
 to make a better answer, at the suit of
Peter Brooke, complainant.

Courtenay and Courtenay.

The writ, when sealed, is left at the *Subpœna* office,
 where the Solicitor calls to take it away.

The party being already in court, no farther appearance is requisite, for he ought to answer fully before he departs the court, therefore the process requires a better answer only, and for that reason is always made returnable immediately, and served upon the defendant's Clerk in court. The defendant is obliged to answer in eight days after service exclusive, or in a town cause obtain an order for time to answer the exceptions generally a month, in a country cause an order for a commission, and six weeks time to return it; any further time is at the discretion of the court, after the time for answering has expired: unless an order for time be served the plaintiff may award the ordinary process to enforce an answer.

Where the answer is reported insufficient, and the party taken on process for not putting in a further answer, and he afterwards puts in a further answer, and pays the costs of contempt (for until then it is no answer), the course is, that the defendant must be discharged; and if the answer be afterwards reported insufficient, the process of contempt must be taken up where it left * off, for the defendant should not lie in

* 1 Cb. Ca. 238.

custody until the Master reports whether the answer was sufficient or not, which may be reported either way, and that after a long time. In case of an insufficient further answer, the process of contempt is to be taken up where it left off, which could not be, if the defendant was to lie in custody. 2 Ves. 110. *Child v. Brubson*.

Where defendant in contempt, for want of answer, puts in an insufficient answer, and the costs of contempt are accepted, the acceptance of costs remits the contempt, and in process for a second answer, the plaintiff must begin *de novo*; if the costs be not accepted, although tendered, and the first answer be reported insufficient, the plaintiff may take up the process for the second answer where he left off at obtaining the first. Therefore it is usual to refuse accepting the costs of contempt for the first answer, until it appears that it is a full answer, and then refusing to receive the answer without the costs. 2 Wms. 481. *Anon.*

Plaintiff accepting a third answer before he receives costs for the second, does not waive his title to the costs. *Bunb. 34.*

If the plaintiff procure a reference of an insufficient answer, and the same be reported good, the plaintiff shall pay the defendant forty shillings costs, *Ord. Canc. 101.* and the defendant may proceed for recovery of these costs by *subpoena* and attachment in like manner as the plaintiff in case the report be in his favour. *Gilb. Ch. 103.*

If the *second* answer be reported insufficient in any of the points formerly certified, the defendant shall pay *three* pounds costs, and such answer may be referred immediately. And upon a *third* insufficient answer, *four* pounds. And upon a fourth insufficient answer five pounds, and be examined upon interrogatories to the points reported insufficient, and shall be committed, until he has perfectly answered these interrogatories, and paid the costs. *Ord. Canc. 102.*

A defendant's plea was over-ruled, and then he put in three insufficient answers; the court did not think fit to commit him to be examined upon interrogatories, as if he

he had put in four insufficient answers. 1 *Ch. Ca.* 279. *Mof.* 384.

When a first answer is reported insufficient, the defendant if he submit to answer, without excepting to the report, is to answer all the points excepted, though the same exceed the bill, for by submitting without excepting to the report, the defendant has admitted he ought to answer all the matters of the exception. 1 *Ch. Ca.* 60.

A defendant by submitting to answer without excepting to the first report of insufficiency has not precluded himself from insisting on the same matter by a second answer; for where an answer by the Master on the first exceptions is reported insufficient, and the defendant submits to answer, and upon exceptions to that second answer the like report is made, and the defendant has excepted to that second report, and brought it before the court, the court has always said, as this matter has not undergone the judgment of the court, it shall be gone into; if it were a single exception, *perhaps*, it would be another matter. 2 *Ves.* 491. *Finch v. Finch.*

Exceptions will lie to an award upon a submission by consent. 1 *Ch. Ca.* 186. 1 *Vern.* 470.

Three defendants put in joint and several answers, which are reported insufficient; two of them submit to answer the exceptions; the other may bring them on to be argued. *Ayl.* 46.

If there are two defendants to a bill, and one of them puts in an insufficient answer, which is so reported, and on exceptions to the Master's report the report is confirmed, afterwards the other defendant puts in just such another answer, and insists on the same matter. The court, for avoiding delay, will judge on the insufficiency of this answer, without sending it to a Master. 1 *Vern.* 74.

Upon exceptions allowed to an insufficient answer, the plaintiff had an order to amend without costs, and the defendant, without waiting for the amendment, put in a further

further answer. The court thought the most proper method was, to take exceptions to the second answer, and to turn the whole amendments into exceptions. *Bunb.* 168.

Exceptions cannot be taken to an infant's answer, because he is not bound by it, but may amend it, when he comes of age. *Bunb.* 338. *Strudwick v. Pargiter.*

When the defendant answers to part, and pleads to all other parts, not answered unto, the plaintiff cannot except to the answer, till he has argued the plea, or obtained an order that the plea shall stand for an answer, with liberty to except to the matter not pleaded unto. 1 *Vern.*

344. And in case of a defendant pleading, or demurring, and answering likewise, if the plaintiff take exceptions to the answer, before the plea or demurrer has been argued, he admits the plea or demurrer to be good; for, unless he admits them to be good, it would be impossible to determine, whether the answer is sufficient or not.

If a demurrer be to part of the plaintiff's bill, and an insufficient answer to the residue, yet the plaintiff cannot except, until the demurrer is argued. 3 *Wms.* 326. But if to a bill, the defendant answer to matter of discovery, and plead only to the relief, the plaintiff may except to any matter of discovery before plea; for that, plainly, no matter of discovery is covered by the plea.

No exception can be taken to an answer, whilst a plea is depending; for that must first be removed out of the way. 2 *Atk.* 390.—This *dictum* of Lord Hardwicke, seems to admit of the following explanation; that where a plea is to the relief, and an answer to the discovery, the plaintiff may except to the answer without arguing the plea, the plea and answer being distinct; but, if the plea be to one part of the relief, and the answer to another, the plea must be got rid of, before exceptions can be filed to the answer. This was determined, in the case of *Pigot v. Stacey*, at the *Rolls*, *Hil.* 1780. and by Lord *Thurlow*, in *Trin.* 1782. in the case of *Sidney, titular Earl of Leicester, v. Perry.*

A plea, on arguing, was ordered to stand for an answer, without saying, one way or the other, whether the plaintiff might except. *Per cur.* A plaintiff can, in no case, except, unless he has leave so to do; for the court, in saying the plea shall stand for an answer, must be intended to have meant a sufficient answer, an insufficient answer being considered as none.——The words, with liberty to except, must be added, to prevent establishing it as a good answer. 3 *Wms.* 239. 3 *Atk.* 814.

If a plea be to stand for an answer, without liberty to except, the plaintiff may except to the rest of the answer. *Mesf.* 74.

A plea, or demurrer, accompanied by an answer to any part of the bill, even a denial of combination merely; if the plea or demurrer be over ruled, the plaintiff must except to the answer, as insufficient, and defendant need not put in any further answer, until the plaintiff has taken exceptions: But if a plea, or demurrer, be filed, without any answer, and be over-ruled, the plaintiff, in such case, need not take exceptions, the defendant must answer the whole bill, as if no defence had been made to it, and the ordinary process of contempt may be awarded, to compel an answer, as if no answer had come in. *Bunb.* 123.

Words of course preceding exceptions to answers.

“ In Chancery,

A. B. Plaintiff.
Between C. D. Defendant.

Exceptions taken by the said complainant to the answer put in by the said defendant to the said complainant's bill of complaint, in this cause.

1st Exception, For that the said defendant hath not answered and set forth, according to the best and utmost of his knowledge, remembrance, information, and belief, whether, &c.

2^d Exception, For that, &c.

3^d Exception, For that, &c.

Conclusion.

Conclusion.

In all which, and divers other particulars, the said complainant humbly insists, the said defendant's said answer is altogether evasive, imperfect and insufficient. Wherefore, the said complainant doth except thereto, and humbly prays that the said defendant may be compelled to amend the same, and put in a full and sufficient answer to the said bill of complaint.

I. Mitford.

Exceptions to Reports of Answers scandalous, impertinent, or insufficient.

THE opinion of the Master, in matters of *scandal, impertinence, or sufficiency of answer*, is conclusive, unless by excepting to the Master's report, or certificate, either of the parties bring the matter on for discussion in court, and there obtain a different judgment.

Exceptions to a report, or certificate of scandal, impertinence, or sufficiency of answer, are, in their nature, similar to exceptions to insufficient answers.

The exceptions drawn, or perused, settled, and signed by council must be fairly transcribed upon paper, or parchment, upon each sheet, or skin, of which there must be a treble sixpenny stamp. The exceptions thus prepared, with the signature of council subscribed, are carried by the Solicitor to the Register-office, and left with the Register, and *five pounds* deposited with him at the same time, as a stake or recompence to the other party, if upon arguing, the exceptions be disallowed: a certificate of the deposit being left, must be procured from the Register, and annexed to a petition, to be presented as soon as conveniently may be to the Lord Chancellor, for an order to set down the exceptions to be argued; the petition and certificate are to be left with his Lordship's Secretary, and ten shillings paid when the petition is taken away answered; the petition answered must be left at the Register-office, to have
the

the order for setting down the exceptions drawn up and passed; a copy of the order being made, and entered at the same office, and one shilling paid for setting down the exceptions with the Register; the order itself must be served by delivering a true copy thereof to the adverse Clerk in court *personally*, or leaving a copy with his agent, at his seat, in the Six clerk's office, in either case shewing, at the time of service, the order passed and entered. The time for setting down the exception, is generally within four days from the date of the order, the order itself in-joining the party so to do, and to give notice forthwith, or the order to be of none effect.

The modern practice of the court has prescribed no precise time wherein exceptions are to be filed to a report, which requires no further act of the court for confirmation. It is however adviseable for a party excepting to a report, or certificate of this kind, to be expeditious; because, upon an answer being reported insufficient, the plaintiff may, upon filing the report, immediately issue and serve a *subpoena* for costs, and another *subpoena* for a better answer; and it may happen, that an attachment for costs may be awarded and executed before the party excepting can procure an order to set down the exceptions to be heard: the mere act of filing exceptions, and making the deposit, will not preclude the adverse party from proceeding for his costs, and for a further answer. The Register, in all cases of exceptions filed to reports or certificates, as well those requiring confirmation, as those which do not, sends a note in writing to the Clerk in court, for the party against whose report exceptions are filed, and deposit made, acquainting him of the exceptions and deposit. In the case of a report requiring confirmation, the act of filing exceptions, and making a deposit, will not impede the regular procedure of making the report absolute in the usual manner; for unless an order be obtained to set down the exceptions to be argued, and they be set down regularly as the order prescribes,

and

and the deposit made, the Register will certify there is "no cause shewn against making the report absolute *." By analogy it may be reasonably presumed, that the mere filing exceptions, and making the deposit, is no stay of proceedings under *any* report; the adverse party is not bound to take notice of any exceptions to a report, until the order for setting down the exceptions has been served. Although there seems to be no limited time for excepting to a report which requires no confirmation, the party ought to file his exceptions within a reasonable time, and before process for costs, and to make a better answer issue, and the attachments consequential thereon respectively. In an amicable suit, the Solicitors on each side usually accommodate each other with time to except, if upon requiring a further answer, the report is intended to be excepted to; and this courtesy is expected by the Clerks in court for the plaintiff and defendant, in order to give a party an opportunity of excepting, without running any risk of paying costs. In an adverse cause, *subpoenas* for costs, and for a better answer, may, in strictness, be awarded, and served as soon as the report or certificate of the answer being insufficient is filed †, and a party

* An order was made to confirm a report *nisi*, before the eight days elapsed, for shewing cause against the order, the defendant filed exceptions, and made a deposit, but obtained no order for setting the exceptions down to be heard; the Solicitor for the plaintiff on the day, for shewing cause, produced an affidavit of service of the order *nisi*, and had neglected to procure a certificate of no cause being shewn. The Register in court, *ortinus* certified, *there was no cause shewn*. The court held, taking and filing exceptions, &c. without an order to set them down, was *no cause* against the order for making the report absolute, and the defendant not having used due diligence therein, confirmed the report absolute. *Hall v. Mulliner, Michas, 1782.*

† If the report be not filed in four days after signing, the proceedings under it are void, and to be discharged with costs. *Ord. Canc. 189. Sed vid. 2 Wms. 517.* it is sufficient if the report be filed before any proceedings had thereon, though not within four days after signing; and this seems to be the spirit of the order, though not the letter.

T

may

may be so situated, as not to be able to prepare exceptions, and procure an order for setting them down with the Register before these *subpœnas* for costs, and for a better answer are served; in this case it would be adviseable, upon service of the *subpœna* for costs, to pay them, and avoid the attachment for non-payment, which may be, and sometimes is, awarded immediately after service (which must be *personal*) of the *subpœna* for costs: after the service of the *subpœna* to make a better answer upon the defendant's Clerk in court, and within the eight days to which, by the course of the court, a defendant is intitled to put in a further answer, exceptions must be prepared, and filed, the deposit (five pounds) made with the Register, an order to set them down obtained and served, and the exceptions actually set down to be heard; for if the party be in contempt, for not putting in a better answer, the mere act of filing and setting down exceptions to the report, will not suspend execution of the process of contempt delivered to the Sheriff: an order must be made upon the adverse party to stay the execution, and if any delay has been made, the court will not stay the process, unless the application (by motion or petition) be accompanied with an affidavit accounting for the delay, and upon notice given to the opposite party: the court will exercise a discretion upon the propriety and regularity of the application, and, if the case made for the party applying be sufficient, will make an order upon the opposite party to stay execution of the process of contempt, already awarded and delivered to the Sheriff, and the party is bound to apprise the Sheriff of the order; or the Sheriff may be served with the order.

An order for time to answer the exceptions, is, *ipso facto*, a submission to answer, and absolutely precludes the defendant from excepting to the report.

The payment of costs, upon service of a *subpœna* for costs, or on the execution of the attachment for non-payment (and which if once paid, although the exceptions be al-

lowed,

lowed, can never be recovered back) seems to be unavoidable; unless the defendant eludes personal service, until he has set down his exceptions to the report with the Register, with the usual formalities, pursuant to an order for that purpose, duly served upon the adverse Clerk in court, and then before the time for putting in a further answer (*viz.* eight days exclusive after service of the *subpæna*) expires, applies to the court, by motion or petition, with a certificate annexed of the exceptions being filed, and stating the case as it is, and that the exceptions are set down, and no delay been made, praying that process of *subpæna* for costs, or of contempt which has issued for non-payment of them, may be staid, the court will in such case interpose and relieve the party. The costs, if paid, can never be recovered, even if the exceptions to the report hold, and therefore the court, where a party uses all due diligence, suspends all process not executed.

Both sides prepare briefs, and instruct council to argue the exceptions: the Solicitor for the party excepting must leave a fair copy of the report, and the exceptions, upon unstamped paper, with the Lord Chancellor's Gentleman, three or four days before the day for arguing the exceptions; the fee on leaving is five shillings: an office copy from the report office, of the report excepted to, should be taken to be ready for production in court, to read, if called for. To prevent any inconvenience arising from the defendant's default of appearing by council on the day for arguing the exceptions, it would be proper to make an affidavit of service upon the adverse Clerk in court of the order for setting down the exceptions to be heard, and this affidavit must be filed at the affidavit-office, and an office copy taken, to be read in court. The junior council for the exceptions opens the exceptions to the court, and the leading council on the same side argues them; the council against the exceptions state their case to sustain the report, and the matter being thoroughly discussed, the Lord Chancellor gives judgment for or against the report, by disallow-

ing or allowing the exceptions; the consequence of allowing exceptions, intitles the party excepting to take back his deposit (five pounds) and his answer is adjudged to be sufficient, if the report certified it to be otherwise. By a disallowance of the exceptions, the party succeeding takes the deposit, and the report is adjudged to be right; and in a question of sufficiency or insufficiency of answer, the answer is virtually adjudged insufficient, and the defendant must put in a further answer, unless he chuses to appeal to the House of Lords, which is rarely or never done in this stage of a suit: each party pays ten shillings and six pence, court fees, and the five pounds deposit is in lieu of all costs, to which the party obtaining judgment in his favour would otherwise be entitled. The consequence of disallowing exceptions to a report of an answer being insufficient, is the establishing the report, and the defendant must put in a further answer, to procure which the plaintiff sues out and serves a *subpœna* for a better answer, upon the defendant's Clerk in court, and the defendant must answer the exceptions in eight days exclusive of the day of service, or obtain by motion or petition an order of course for time, and in a country cause a commission to take his answer; in default, the ordinary process of contempt may be awarded to compel an answer. In cases of scandal or impertinence, a disallowance of exceptions to a report certifying the record referred, to contain scandalous or impertinent matter, confirms the opinion of the Master as certified in his report, and the court will sometimes at the arguing make an order that it be referred to the Master to expunge the scandal or impertinence, or if no order of that nature be made, but the exceptions are disallowed, without saying any thing further, the party may apply by motion of course, upon the foot of the order for disallowing the exceptions, to refer the record to the Master, to expunge the scandal or impertinence, and the deposit is given to the party succeeding.

Sometimes a party, for delay, will set down exceptions, and will not appear at the hearing; the exceptions,
upon

upon such default, are disallowed of course, and the deposit ordered to the opposite party if he appears; who in such case must make an affidavit of his being served with the order for setting down the exceptions, and produce an office copy of the affidavit, filed at the affidavit office, to the Register before the order is delivered out to him, with the deposit. If neither side appear when the exceptions are called on, they will be struck out of the paper, and the party excepting may apply for his deposit. So soon as exceptions to a report of an answer being insufficient are struck out or disallowed, the plaintiff may immediately sue out and serve a *subpœna* to make a better answer, and the ordinary process of contempt may be awarded, if default be made.

The costs attending exceptions to a Master's report, are very inadequate to the costs incurred by the party succeeding in his application; a party excepting deposits five pounds, and if his exceptions are allowed, he takes back his deposit, and recovers no costs. On the other hand, if exceptions are disallowed, the party succeeding takes the deposit in place of costs. This deposit was originally forty shillings, with such increase of costs, if the report was altered by the court, as the court should find cause to impose*. The court taking notice of the expence attending exceptions to reports, which being frequently frivolous, vexatious, and for delay merely, ordered every person putting in exceptions to reports, besides the forty shillings deposit, to pay ten shillings for every exception or distinct branch of exception which should at the hearing be overruled§. And as a further discouragement to parties excepting to reports, a subsequent order was made, augmenting the ten shillings to twenty shillings for each exception disallowed, and for every exception, or branch of exception not opened, or waved, ten shillings over and besides the forty shillings deposited. *Ord. Canc. 186.*

The court, in fixing a gross sum, virtually annulled the former orders, and the costs attending exceptions to Master's

* *Ord. Canc. 120.*

§ *Ord. Canc. 142. 168.*

report, are now limited to a sum of five pounds: the court may exercise a discretion according to the exigency of the case, and gives costs or not as it sees cause.

Where exceptions are taken to a defendant's answer for insufficiency, and the Master reports it insufficient, and upon exceptions the Court is of opinion it is sufficient; the party succeeding in this application shall not have the costs of it, but it shall abide the event of the suit. The rule of the court is never to give costs, but where there appears to have been no just grounds for the proceeding. 3 *Atk.* 235.

If an answer by the Master, on the first exceptions, is reported insufficient, and the defendant submits to answer, or slips his time for putting in exceptions to the report, and upon exceptions to that second answer, the like report is made, the defendant may except to the second report, and bring it before the court; where there are several exceptions, the court has always said that as this matter has not undergone the judgment of the court, it shall be gone into; perhaps it might be otherwise, if it were a single exception. 2 *Ves.* 492.

On an answer being reported not scandalous, or impertinent, if the plaintiff except to the report, he must shew in what line, or page, and how far the answer is scandalous or impertinent; it is not sufficient in the exceptions to alledge the scandal or impertinence generally, 2 *Wms.* 181. *sed vid.* 2 *Atk.* 182. where a bill was referred to a Master, for impertinence, the Master reported it pertinent, the defendant took a general exception to that part of the report, without specifying the particular parts of the bill which were impertinent: for this reason it was objected, that the exception was irregular, and contrary to the course of the court. Lord Hardwicke held that notwithstanding the exception was taken in so general a manner, yet it may be gone into, without pointing out particular passages.

Where exceptions are taken to an answer for insufficiency, and the Master reports it sufficient, the plaintiff, in his exceptions to the Master's report, should shew wherein the answer is insufficient. *Dic.* 2 *Wms.* 181. Words

Words of course preceding Exceptions to a Master's Report.

In Chancery,

Between

A. B. Plaintiff.

C. D. Defendant.

Exceptions taken by the said complainant to the report of Edward Leeds, Esquire, one of the Masters of this court, made in this cause, and bearing date the 20th day of January, 1783.

First Exception — For that the said Master hath in and by his said Report stated, &c.

Second Exception — For that the said Master hath in and by his said Report certified, That, &c.

In all which particulars, the said complainant doth except to the said Master's said Report, and humbly appeals therefrom to the judgment of this honourable court.

W. Ainge.

Of further Answers, and Answers to amended Bills.

A Further answer, and an answer to an amended bill, are in their nature similar: the one arising from a deficiency in a first answer, whereby certain material clauses in a complainant's bill are omitted to be answered, or answered imperfectly, and evasively; the other is the consequence of a disclosure of new matter in an answer, or a discovery of facts subsequent to exhibiting the original bill, existing at the time of preferring the bill, and not at that time thought material or necessary to constitute part of the complainant's case.

A further answer is in every respect similar to, and indeed is considered as forming part of the first answer;

for if a defendant in his first answer refuses or neglects to answer all the material and relevant points of the bill, or answer them insufficiently, and imperfectly; the points of the bill not answered, or answered insufficiently, are selected from the record; and being collected together form exceptions, an answer to which is termed a *further answer*.

Matter disclosed by a defendant's answer, or facts existing at the time of exhibiting a bill, and not then known to the complainant, or considered necessary to constitute part of his case, or ingredient therein, are by the complainant with leave of the court added to or inserted in the bill by way of amendment, and the answer which the defendant is compellable to make thereto, is denominated *an answer to an amended bill*.

As a further answer is considered as forming part of the first answer, so an answer to an amended bill is considered as part of the answer to the original bill, as much as if it had been ingrossed on the same parchment, and a part of the same record. Therefore, if a defendant in a further answer, or an answer to an amended bill, repeat any thing contained in a former answer, the repetition, unless it varies the defence in point of substance, will be considered as impertinent*. If upon reference to a Master, such parts of the answer are reported to be impertinent, they will be struck out as such, with costs, which in strictness are to be paid by the council who signed the answer.

The manner of preparing and filing a further answer, and the time allowed for putting in the same, is sufficiently and at large treated of in the preceding head of exceptions.

An answer to an amended bill is prepared and filed with the same formalities, either in a town or country cause, as an answer to an original bill. If the amendments

*3 Atk. 303.

in the bill be so trifling as to require no further answer, it will notwithstanding prevent the complainant from replying, until eight days after the record, or the defendant's office copy is amended, and delivered over to the defendant's Clerk in court: and a defendant sometimes for delay, will, upon motion or petition, obtain the three usual town or country orders, for time to answer the amendments (to which in strictness he is intitled): and after the whole time obtained by these orders has been spun out, the defendant files no answer, or a frivolous answer merely to save appearance of wilful delay.

Sometimes a complainant will take exceptions to the defendant's answer, and if the defendant submit to answer the exceptions without reference to a master, or if an answer be reported insufficient upon reference, and no exceptions filed to the report, or upon a disallowance of exceptions taken to a report of an answer being insufficient, in all or any of these cases, a complainant may, by motion or petition, obtain an order of course, to amend his bill without costs, and that the defendant may answer the amendments and exceptions at the same time, provided the amendments be not so extensive as to require a fresh ingrossment; for in that case, twenty shillings costs must in all events be paid to the defendant's Clerk in court before any proceedings can be had; because the defendant is obliged to be at the expence of a fresh office copy of the amended bill; and this is always the practice where the amended bill is newly ingrossed, although the defendant's answer be reported insufficient, or the defendant submits to answer the exceptions taken to his answer.

A *subpœna* to answer the amendments, is not served when exceptions are taken to an answer where the defendant submits, and the plaintiff obtains an order upon such submission to amend his bill, and that the defendant may answer the exceptions and amendments at the same time; service of the order to amend, and to answer the exceptions and amendments at the same time, by
leaving

leaving a copy of the order passed and entered, upon the defendant's Clerk in court personally, or with his agent at his seat in the Six-clerk's office, will be compulsory upon the defendant, and the process of *subpœna* is not necessary. Where amendments are not engrafted on exceptions to an answer, a *subpœna* to make a better answer must be served, and the ordinary process of contempt issued to enforce the answer if necessary.

Words of course preceding a further answer.

The further answer of *A. B.* defendant, to the bill of complaint of *C. D.* complainant.

This defendant now, and at all times hereafter, saving and reserving to himself all such advantage of exception to the complainant's said bill, as in and by his former answer he hath saved and reserved, for further answer unto the complainant's said bill of complaint, or so much thereof as this defendant is advised materially concerns him to make answer unto, he this defendant answereth and saith, &c.

Or thus :

— *This defendant, for further satisfaction to this honourable court, and for answer unto the several exceptions taken by the complainant to his former answer, answereth and saith, &c.*

Conclusion.

And this defendant denies all and all manner of combination and confederacy wherewith he is charged, without that, That there is any other matter or thing in the said complainant's bill of complaint contained, material or effectual in the law for this defendant to make answer unto, and not herein or in his former answer answered unto, confessed and avowed, traversed or denied, is true : All which matters and things this defendant is ready to aver and prove as this honourable Court shall direct,
and

and humbly prays to be hence dismissed, with his costs and charges in this behalf most wrongfully sustained.

J. Scott.

Words of course preceding an answer to an amended bill.

The answer of *A. B.* defendant, to the amended bill of complaint of *C. D.* complainant.

This defendant saving and reserving to himself, as in and by his former answer he hath saved and reserved, for answer to the said complainant's said amended bill, or to so much thereof as this defendant is advised is necessary or material for him to make answer unto, he answereth and saith, &c.

Conclusion.

And this defendant denies all and all manner of unlawful combination and confederacy in the complainant's said amended bill charged, without that, That there is any other matter or thing in the complainant's said amended bill of complaint contained material and effectual for this defendant to make answer unto, and not herein and hereby sufficiently answered unto, confessed, avoided, traversed, or denied, is true, to the knowledge and belief of this defendant; all which matters and things this defendant is ready to aver, maintain and prove, as this honourable court shall direct; and humbly prays to be hence dismissed, with his reasonable costs and charges in this behalf most wrongfully sustained.

J. Mitford.

Replication.

THE replication is the plaintiff's answer or reply to the defendant's plea or answer; and this must be filed, in order to put the answer in issue, unless the plaintiff finds sufficient matter confessed in the defendant's answer to ground a decree upon, and sets down his cause upon bill

bill and answer only; but in such case the defendant being deprived of the means of supporting his answer by testimony of witnesses, the whole of the answer will be taken as true in every point. The replication must be general, except the defendant, by his answer, offer new matter, which will not be brought into issue by the bill and answer, or denies only one or some few points of the bill: for no new matter is to be contained in any replication, unless it be to avoid new matter set forth in the defendant's answer*. It shall also affirm and aver the allegations in the bill to be true, certain and sufficient, and confess and avoid, or traverse and deny the truth and sufficiency of the defendant's plea or answer. The replication should have convenient form, and be short and concise in substance, and not be stuffed with tautologies or impertinent or criminal matter, but directly and pertinently pursue the substance of the bill, and by no means depart therefrom, the decree being always *secundum formam petitionis*.

Formerly if the defendant, by his plea or answer, offered new matter, the plaintiff replied specially, otherwise the replication was as at present merely a general denial of the truth of the plea or answer, and of the sufficiency of the matter alledged in it to bar the plaintiff's suit, and an assertion of the truth and sufficiency of the bill. The consequence of a special replication was a *rejoinder*, by which the defendant asserted the truth and sufficiency of his answer, and traversed every material part of the replication†. If the parties were not then at issue by reason of some new matter disclosed in the rejoinder, which required an answer, the plaintiff might surrejoin to the rejoinder, and the defendant might in like manner adsurrejoin, or rebut to the surrejoinder‡. The inconvenience, delay, and unnecessary length of pleading, arising from these various

* *Ord. Canc.* 122. *Bac. Ord.* † 2 *West. Symb. Ch.* 195. a. 32. b. 246. b. ‡ *West. Ch.* 195. *Reg. Prac.* 315.

allegations on each side, occasioned an alteration in the practice. *Special replications*, with all their consequences, are now out of use, and the plaintiff is to be relieved according to the form of the bill, whatever new matter may have been introduced by the defendant's plea or answer; but if the plaintiff conceive, from any matter offered by the defendant's plea or answer, that his bill is not properly adapted to his case, he may obtain leave to amend his bill, and suit it to his case, as he shall be advised. To this amended bill, the defendant may make such defence as he shall think proper, whether required by plaintiff to answer it or not.

The signature of council is not required to a general replication. The plaintiff's Clerk in court, instructed by his client, files it of course. The replication, in the following form, is ingrossed upon parchment, with an half-crown stamp, the day of the month, and year when filed, being previously inscribed thereon, with the surname of the plaintiff's Six Clerk, and Clerk in court who files it subscribed at the foot, on the left side, and also the term in which the bill was filed, and the surname of the defendant's Six-clerk. The Clerk in court enters it in his cause book, and then leaves it in his Six-clerk's study to be filed, usually acquainting the defendant's Clerk in court therewith, by note in writing.

" In Chancery,
Winter.

Between

A. B. Plaintiff.
C. D. Defendant.

The Replication of *A. B.* complainant to the answer of
C. D. defendant.

" This repliant, saving and reserving to himself all
 " and all manner of advantage of exception to the mani-
 " fold insufficiencies of the said answer, for replication
 " thereunto faith, that he will aver and prove his said bill
 " to be true, certain, and sufficient in the law to be an-
 " swered

bill and answer only; but in such case the defendant being deprived of the means of supporting his answer by testimony of witnesses, the whole of the answer will be taken as true in every point. The replication must be general, except the defendant, by his answer, offer new matter, which will not be brought into issue by the bill and answer, or denies only one or some few points of the bill: for no new matter is to be contained in any replication, unless it be to avoid new matter set forth in the defendant's answer*. It shall also affirm and aver the allegations in the bill to be true, certain and sufficient, and confess and avoid, or traverse and deny the truth and sufficiency of the defendant's plea or answer. The replication should have convenient form, and be short and concise in substance, and not be stuffed with tautologies or impertinent or criminal matter, but directly and pertinently pursue the substance of the bill, and by no means depart therefrom, the decree being always *secundum formam petitionis*.

Formerly if the defendant, by his plea or answer, offered new matter, the plaintiff replied specially, otherwise the replication was as at present merely a general denial of the truth of the plea or answer, and of the sufficiency of the matter alledged in it to bar the plaintiff's suit, and an assertion of the truth and sufficiency of the bill. The consequence of a special replication was a *rejoinder*, by which the defendant asserted the truth and sufficiency of his answer, and traversed every material part of the replication†. If the parties were not then at issue by reason of some new matter disclosed in the rejoinder, which required an answer, the plaintiff might surrejoin to the rejoinder, and the defendant might in like manner adsurrejoin, or rebut to the surrejoinder‡. The inconvenience, delay, and unnecessary length of pleading, arising from these various

* *Ord. Canc.* 122. *Bac. Ord.* † 2 *West. Symb. Ch.* 195. a. 32. b. 246. b. ‡ *West. Ch.* 195. *Reg. Prac.* 315.

allegations on each side, occasioned an alteration in the practice. *Special replications*, with all their consequences, are now out of use, and the plaintiff is to be relieved according to the form of the bill, whatever new matter may have been introduced by the defendant's plea or answer; but if the plaintiff conceive, from any matter offered by the defendant's plea or answer, that his bill is not properly adapted to his case, he may obtain leave to amend his bill, and suit it to his case, as he shall be advised. To this amended bill, the defendant may make such defence as he shall think proper, whether required by plaintiff to answer it or not.

The signature of council is not required to a general replication. The plaintiff's Clerk in court, instructed by his client, files it of course. The replication, in the following form, is ingrossed upon parchment, with an half-crown stamp, the day of the month, and year when filed, being previously inscribed thereon, with the surname of the plaintiff's Six Clerk, and Clerk in court who files it subscribed at the foot, on the left side, and also the term in which the bill was filed, and the surname of the defendant's Six-clerk. The Clerk in court enters it in his cause book, and then leaves it in his Six-clerk's study to be filed, usually acquainting the defendant's Clerk in court therewith, by note in writing.

" In Chancery,
Winter.

Between

A. B. Plaintiff.
C. D. Defendant.

The Replication of *A. B.* complainant to the answer of
C. D. defendant.

" This repliant, saving and reserving to himself all
" and all manner of advantage of exception to the mani-
" fold insufficiencies of the said answer, for replication
" thereunto faith, that he will aver and prove his said bill
" to be true, certain, and sufficient in the law to be an-
" swered

“ swered unto, and that the said answer of the defendant
 “ is uncertain, untrue, and insufficient to be replied unto
 “ by this repliant, without that, That any other matter or
 “ thing whatsoever in the said answer contained, mate-
 “ rial or effectual in the law to be replied unto, confessed
 “ and avoided, traversed or denied, is true ; all which
 “ matters and things this repliant is and will be ready
 “ to aver and prove as this honourable court shall direct,
 “ and humbly prays, as in and by his said bill he hath
 “ already prayed.”

Radcliffe, Clerk.

Began Trinity 1782.

To Mr. *Reynardson*.

A special replication is always signed by council ;
 and by the modern practice very rarely made use of.
 The following may serve as a specimen :

Zincke, 10 June, 1778.

*Easter term, in the 18th year of the }
 Reign of King George III. }*

The Replication of *John Marshall* complainant
 to the several answers of *Holdsworth New-*
man, John Baring Esq ; William Newman,
 and *Richard Newman*, defendants to the said
 complainant's original and amended bill.

“ This repliant, saving to himself all and all manner
 “ of advantage of exception to the manifold insufficiencies
 “ of the said answers, for and by way of replication,
 “ saith, that his said original and amended bills of com-
 “ plaint, exhibited into this court against the said de-
 “ fendants, and all and every the matters, &c. therein
 “ contained, are true, certain, and sufficient in the law
 “ to be answered unto by the said defendants ; and that
 “ the answers of the said defendants are untrue, uncer-
 “ tain, and insufficient in the law to be replied unto by
 this

“ this repliant ; save and except, that this repliant doth
“ admit to be true, as in the said answers, some or one of
“ them, is by the said defendants, some or one of them,
“ alledged, That the mortgage in the said original and
“ amended bill, mentioned to be made by *Philip Marshall*,
“ deceased, to *Richard* and *Robert Newman*, deceased, and
“ therein respectively named, and bearing date the second
“ day of *June*, 1754, was made and entered into, be-
“ tween them, of and concerning, and comprehended all
“ the said *Philip Marshall*’s then plantations and mea-
“ dows in *Newfoundland*, and in the said original, and
“ amended bill, and the said defendant’s said answer, re-
“ spectively mentioned, and that the same plantations, and
“ meadows, were or are all situate and being in *Saint*
“ *John’s Newfoundland* afore said, in the said bill also men-
“ tioned : and this repliant doth moreover admit it to be
“ true, as in the said answers of the said defendants, some
“ or one of them, is alledged, that on or about the second
“ day of *October*, 1775, the said *Philip Marshall* did settle
“ an account with an agent of or for the said *Richard*
“ *Newman*, then deceased, and in the said bill named, or
“ of or for his executors, of and concerning all and
“ every sum and sums of money therefore due and ow-
“ ing from the said *Philip Marshall*, to the said *Richard* and
“ *Robert Newman*, or either of them, their or either of
“ their executors or administrators, and did by an agree-
“ ment of that date, in writing under his hand and seal,
“ admit, and this repliant doth now hereby admit and
“ acknowledge, that on the said second day of *October*,
“ 1755, there was due and owing from the said *Philip*
“ *Marshall*, on the said security of all the said plantations
“ and premises, and on the balance of such accounts,
“ the full sum of 577*l.* 3*s.* in the said answers, or some
“ or one of them, mentioned and claimed as the then
“ balance of such accounts, and payable with inter-
“ est. Without that, That there is any other matter
“ or thing in the said defendant’s said answers contained,
“ material,

“ material, or effectual, for this repliant to reply unto, and
 “ not herein and hereby well and sufficiently replied unto,
 “ confessed and avoided, traversed or denied, is true. All
 “ which matters and things (save and except as aforesaid)
 “ this repliant is ready to aver, and prove, as this court
 “ shall award, and prays as in and by his said original and
 “ amended bill he hath prayed.”

John Heath.*

Shepherd.

Began Hilary 1775.

To Mr. Mitford, and

Mr. Winter.

The replication must be filed, before the end of the third term, exclusive of the term in which the plaintiff's answer was filed; if no replication be filed within that time, the bill may be dismissed with costs, upon motion, or petition, of course, without notice to the plaintiff, of such motion, producing the Six-clerk's certificate of the answer being filed, and no proceedings had for three terms: so a dismissal of the bill may be, if, after replication filed, there be no proceedings for three terms, as where a replication is filed in *Hilary* term, and no proceedings are had in the *Trinity* term following vacation seals, the bill may be dismissed in *Michaelmas*; but in that case, notice to the plaintiff is necessary.

Though the plaintiff happen to need no witness, on his part: yet it may be sometimes necessary to reply, and put the defendant upon proof of the matter in his answer, as if he confesses the matter alledged by the plaintiff, but sets out some further matter in bar. *Prac. Reg.* 15.

If the plaintiff reply to an answer, and without rejoinder or rules given for publication, bring the cause on to a hearing, the answer will be taken wholly true, as if there had been no replication; for the opportunity which the defendant had of filing his answer is taken from him. *Chan. Ca.* 21. 3 *Wms.* 237.

* Now a puisne Judge of the Common pleas.

If there be a plea and answer to the same bill, and the plaintiff replies to the plea only, it is irregular, for the replication should go to the answer as well as the plea; and for this reason in the principal case, the cause was ordered to stand over, and that the defendant should file a replication to the answer *nunc pro tunc*. 2 Vern. 46. But this seems to admit of a distinction where the plea and answer are to separate parts of the bill, and the answer is in no wise in aid of the plea, as denying notice, fraud, &c. or where the plea and answer are independent of each other, for in such case the plaintiff may reply to either.

The plaintiff set down his cause to be heard upon bill and answer, and had a decree against the defendant by default, and when the defendant came to shew cause against the decree, it was altered in his favour. The plaintiff petitioned to rehear the cause, and at the rehearing prayed leave to reply to the defendant's answer, and had it, paying costs. *Eq. Ca. Abr.* 43.

A defendant in his plea of a purchase for a valuable consideration, omits to deny notice of it; the plaintiff replies to it; all the defendant has to do, is to prove his plea; for the plaintiff having replied to the plea, has admitted it to be good; and issue being joined, is to try whether it be true in fact: and it is not material if the plaintiff proves notice; for it was the plaintiff's own fault that he did not set down the plea to be argued, in which case it would have been over-ruled. 3 Wms. 94.

If the plaintiff replies to defendant's plea, he thereby admits the plea to be good, if it be true; and the validity of it can never afterwards be considered, but only the truth of it, as the defendant proves it, or the plaintiff disproves it at the hearing. *Preced. in Ch.* 58.

Where witnesses have been examined, and no replication filed, the court at the hearing, or even after a decree, will order a replication to be filed *nunc pro tunc*. *Msf.* 296.

If a defendant disclaims generally, and the plaintiff replies to the answer, and serves a *subpœna* to rejoin, the defendant is intitled to have costs for the vexation; *secus*, where the disclaimer is to part, and the answer to the residue. 3 *Atk.* 582.

The court will not give leave to withdraw a replication, unless it be added, that the plaintiff may be thereby enabled to amend his bill, or some reason to induce the court to grant the plaintiff this indulgence, because otherwise it may be a contrivance to defeat the defendant of his full costs, by getting the bill dismissed at the hearing, with 40 shillings costs. 3 *Atk.* 565.*

The plaintiff put matter in the replication which was not contained in the bill, and which matter the plaintiff knew of at the time of exhibiting the bill: the defendant pleaded and demurred to the replication, which the court allowed of. *Chan. Rep.* 259.

The plaintiff filed a special replication; the defendant pleaded and demurred thereto; his plea was, that since his answer put in he had recovered the estate in question, in ejectment, upon full evidence at a trial at bar, and demurred to other special parts of the replication. The plaintiff's council admitted the plea and demurrer to be good, which were therefore allowed; but the court declined giving any opinion whether the plaintiff might not, notwithstanding the plea and demurrer were allowed, afterwards put in a general replication. 1 *Vern.* 351.

* Lord *Hardwicke* gave directions to the Register to frame a general order, which might for the future prevent applications to the court to withdraw the plaintiff's replication, in order to set down the cause, on bill and answer only, and by such means get the bill dismissed with costs, according to the course of the court, whereas otherwise he must have paid the defendant his full costs, 3 *Atk.* 579. *Mich.* 1747.

Rejoinder and joining in Commission.

A Rejoinder is the defendant's answer to the plaintiff's replication, which must pursue and confirm the answer, or traverse and deny every material point of the replication*.

According to the present course of the court, *Rejoinders*, *Surrejoinders*, *Rebutters* and *Surrebutters* are disused. The delay, expence, inconvenience, and unnecessary length of pleading, arising from these various allegations on each side, occasioned an alteration in the practice. New matter offered by a defendant, in an answer which formerly gave rise to a special replication, being by the present mode of practice introduced into the bill by way of amendment; the ancient practice of replying specially to such matter, has of late years fallen into desuetude: special replications, and the rejoinders consequential thereto, are now rarely or never heard of: a cause being at issue by the replication, a rejoinder is never actually filed †.

It may not be improper to observe, that although by the course of the court, as at present established, a rejoinder is seldom or never filed, the *subpœna* to compel the defendant to rejoin, being merely to put the matter in issue, and to give the parties an opportunity of examining witnesses to the facts alledged on the one side, and sworn to on the other; yet cases may arise, in which a rejoinder may possibly be necessary, as where a plaintiff in a cause has examined a witness *de bene esse*, and afterwards replied, without proceeding to serve a *subpœna* to rejoin, the defendant may immediately file a rejoinder, and compel the plaintiff to examine in chief his witness examined *de bene esse*, a neglect of which will render the depositions taken *de bene esse* nugatory, if the witness live long enough to be examined in chief.

The following precedent of a rejoinder may not be unacceptable to the practitioner.

* *West. Symb.* 195.

† *Mof.* 296.

292 Rejoinder and joining in Commission.

“ The rejoinder of *C. D.* and *E. F.* defendants, to
“ the replication of *A. B.* complainant.”

“ The said defendants now and at all times hereafter,
“ saving and reserving to themselves all and all manner
“ of benefit and advantage of exception to the incertainty
“ and insufficiency of the said replication, they and
“ each of them, saith, That the defendant's said answer
“ is certain, true, and sufficient in the law to be re-
“ plied unto; and they also say, as in and by their
“ said answer they have already said, and do and will
“ aver and maintain, all and every thing and things therein
“ to be true and certain, in such manner and form as
“ they and every of them are therein alledged and ex-
“ pressed.”

Or thus :

—“ The said defendant rejoineth, and saith, in all and
“ every thing as in and by his said answer he hath already
“ said, and doth and will aver, maintain, and prove the
“ same, and all and every thing and things, clauses and
“ allegations therein contained, to be true and sufficient
“ in the law to be replied unto, in manner and form
“ as the same are in the said answer already set forth and
“ declared. And this defendant further saith, That the
“ said replication of the said complainant is very uncer-
“ tain, untrue, and insufficient in the law to be rejoined
“ unto by this defendant, for divers defects and imper-
“ fections therein contained, and that the same is so con-
“ trived and made, to the end to give some feigned co-
“ lour to maintain the said bill in this honourable court,
“ to the unjust vexation of this defendant. In that the
“ said complainant, by the ill practices and sinister de-
“ signs of one *R. T.* who, as it is said, prosecuteth the
“ said suit for the said complainant against this defendant,
“ did, contrary to equity and good conscience, procure this
“ defendant, an ignorant illiterate man, to become bounden
“ by obligation, in the said replication mentioned, with
“ the condition whereof this defendant is utterly ignorant,
“ the same having never been read to him. Without
“ that,

Rejoinder and joining in Commission. 293

“that, that there is any other matter or thing in the said replication contained material or effectual in the law to be rejoined unto by this defendant, and not herein and hereby well and sufficiently rejoined unto, by this defendant, and not herein or hereby well and sufficiently confessed and avoided, traversed or denied, is true. All and every of which matters this defendant is ready to aver and prove, as this honourable court shall award, and therefore prayeth, as he before in his said answer hath already prayed.”

W. Bootle.

Wherever the replication is filed, although rejoinders are out of use, in order to close the *litis contestatio*, issue must be joined by assigning a probatory term to the defendant; and this is done by *subpœna*, requiring him to appear to rejoin, unless he will appear gratis*. The effect of this process is merely to put the cause completely in issue between the parties: formerly the replication was held to put the matter so far in issue, that the bill could not be dismissed for want of prosecution, because the defendant might rejoin gratis, and prove his answer†: This practice is now altered; the meer filing of a replication, though it puts the defendant in a capacity of making proof of his answer, not preventing a dismissal of the bill, if the plaintiff lay by for three terms, without proceeding, after the replication is filed. According to the modern practice, after the return § of the *subpœna* to rejoin (which by order obtained of course is now usually made returnable immediately) the parties proceed to the examination of witnesses to support the facts alledged in the proceedings of each side. For after replication, the defendant may, if he will, rejoin gratis, and force the plaintiff to commission, or take it *ex parte* ‡.

No fruit shall be taken of any *subpœna ad rejuendum*, unless there be a replication first entered with and filed

* *Mof.* 123, 296. † *Gillb. Ch.* 114. § *Prac. Reg.* 314.
‡ *Comp. Att.* 429. *Totb.* 16.

294 Rejoinder and joining in Commission.

by the plaintiff's Six clerk in the cause according to the course of the court, before the issuing out of the said *subpœna*, or at least before the return thereof; and the parties upon whom such *subpœna* shall be served, finding no replication so filed before the return thereof, shall have the ordinary costs taxed. *Ord. Canc.* 45, 102.

The plaintiff having by his replication put the defendant's answer in issue, to support the points of his bill by testimony of witnesses, he must sue out and serve a *subpœna*, requiring the defendant to rejoin and join in commission. This writ may be made returnable on any day certain in term. It must be served by delivering the label to the defendant personally, shewing him, at the time of service, the body of the writ under seal, or by leaving the body of the writ, under seal, at the defendant's dwelling house, or place of abode, with one of the family ||. This mode of serving the *subpœna* is rarely done, unless the defendant live in *London* or within twenty miles, and can be easily served; and no benefit or advantage arises, unless it be by avoiding the expence and trouble of procuring an order for a *subpœna* returnable *immediate*. The most usual method of practice, in all cases indiscriminately, is to apply by motion in court, or petition to the Master of the Rolls, *for a subpœna to rejoin, returnable immediately, and that service on the defendant's Clerk in court, may be deemed good service on the defendant.* This is entirely of course, and never refused. And in a country cause, it is added, *that the plaintiff may be at liberty to take out a commission for the examination of witnesses, [* returnable without delay, with liberty to execute the same in term time] with the usual directions †.* The

|| If there be more than one defendant, one or two must be served with labels, and the body of the writ left at the dwelling house of the party last served with one of the family.

* The words in brackets are inserted or omitted as the case may require.

† Those directions are, *that the defendant's Clerk in court may, in four days after notice thereof, join in commission, and strike commissions*

Rejoinder and joining in Commission. 295

The order being drawn up, passed and entered with the Register, a *præcipe* for a *subpæna* to rejoin, returnable immediately in the following form, must be left at the *Subpæna*-office, producing the order for the *subpæna* passed and entered when the *præcipe* is left at the office.

Subpæna Gilbert Venables to appear in Chancery, ret.
immediately to rejoin with *Hugh Leycester*.
Booth Sollicitor. tested 20 *June*, 1783.

The form of the writ is as follows.

“ *G E O R G E* the Third, &c. To *Gilbert Venables*,
“ Greeting. For certain causes, offered before us, in
“ our Chancery, We command and strictly injoin you,
“ that laying all other matters aside, and notwithstanding
“ any excuse, you personally be and appear before us, in
“ our said Chancery, *immediately after the receipt of this writ*,
“ wheresoever it shall then be; to answer concerning those
“ things which shall be then and there objected to you,
“ and to do further and receive what our said court shall
“ have considered in this behalf. And this you may in no
“ wise omit under the penalty of one hundred pounds,
“ and have there this writ. Witness Ourself at *Westmin-*
“ *ster*, the 20th day of *June*, in the twenty-third year of
“ our reign.”

Courtenay and Courtenay.

Indorsed *By the court*, to rejoin and join in commission, in
the cause of *Hugh Leycester*.

Label. *Gilbert Venables* to appear in chancery, ret. immed.
to rejoin with *Hugh Leycester*.

Courtenay and Courtenay.

missioners names with the plaintiff's Clerk in court; or, in default thereof, that the plaintiff may be at liberty to take out a commission, directed to his own commissioners.

296 Rejoinder and joining in Commission.

Five shillings is paid, if one or two defendants, and six pence for the additional label where there are three defendants,— only three defendants can be inserted in one writ; husband and wife are reckoned as one defendant.

The *subpæna* being obtained from the *Subpæna*-office, the plaintiff's Solicitor serves it upon the defendant's Clerk in court *, by leaving the body thereof at the Clerk in court's seat in the Six-clerks office with his agent, or personally upon the Clerk in court, serving, at the same time, the order passed and entered for the *subpæna*, with such return, by leaving a copy of the order with the defendant's Clerk in court personally, or with his agent, at his seat in the Six-clerks office, shewing the original order passed and entered; [for unless the order be served, the defendant's Clerk in court cannot accept the writ, with the *extraordinary* return,] and the service of the order should precede or accompany the service of the *subpæna*.

If the defendant rejoin *gratis*, or the parties go to commission by consent, there needs no *subpæna* to rejoin. *Prac. Reg.* 83. *Chan. Ca.* 15.

The *subpæna*, returnable immediately, being served as before mentioned, after the expiration of four days, exclusive of the day of service; the plaintiff's Clerk in court proceeds to examine those witnesses on behalf of the plaintiff, who live within ten † miles of *London*, by exhibiting interrogatories, in the Examiner's office ‡: and after he has examined one or two witnesses, or before, a rule to produce witnesses must be entered in the

* If there be more than one Clerk in court, one or two must be served with labels, and the body of the writ under seal, left with the Clerk in court last served.

† *Ord. Canc.* 109.

‡ The course of the court at present, is to examine all witnesses resident within twenty miles of *London*, at the Examiner's office, and in case of sickness, or other disability, the Examiner will attend the witness.

Rejoinder and joining in Commission. 297

house book, in the Six-clerks office, in that Six-clerks division where the cause originally began. The rule to produce witnesses expires that day sev'n-night from the day on which it is given. The rule may be entered on any day in term, provided it be entered eight days before the expiration of the term, otherwise it must be entered in the ensuing term. The rule is written in the following form in the house book in the Six-clerks office, and a transcript thereof being copied into the rule book of the Clerk in court, giving the rule, the book is taken to the Register-office to be entered: the Register sets his initials against the rule in the margin of the book, for which one shilling and four pence is paid. The Clerk in court, entering the rule, gives a note in writing to the adverse Clerk in court, of such rule being entered.

The rule is entered in the books in the form following:

23 January, 1783.

Leycester	}	A rule is given to the defendant to produce witnesses.
v. Venables		

Shepherd, Clerk for plaintiff.

The cause being at issue † by the *subpæna* or appearance *gratis*, to rejoin, either plaintiff or defendant may examine, and give a *rule to produce witnesses*, as before mentioned.

In a country cause, or where the witnesses reside above ten* miles from *London*; the examination of witnesses is by commission, issued under an order of course obtained for that purpose, and which in general constitutes part of the order for a *subpæna* returnable *immediately*; but before

† A *subpæna* to rejoin against three, only two are served; if the plaintiff proceeds to examine, the party not served shall not be concluded by those examinations, being no party thereto. *Pr. H. ch.* 15.

* *Ord. Canc.* 109. The course of the court is to examine all witnesses within 20 miles of *London*, at the Examiner's office.

298 Rejoinder and joining in Commission.

this commission issues, the plaintiff is ordinarily to reply, and to serve the defendant with a *subpœna* to rejoin, unless he will rejoin *gratis*, and join in commission ||. The order prescribes four days for the defendant to join in commission. The plaintiff's Solicitor having given his Clerk in court four commissioners names, any time after the expiration of four days exclusive of the day of service of the *subpœna*, and of the order passed and entered, the plaintiff's Clerk in court may call upon the defendant's Clerk in court to join in commission. The plaintiff's and defendant's Clerks in court having interchangeably given four commissioners names, for their respective clients ; the eight names are entered by the Clerks in court in their respective commission books*: and this is termed *joining in commission*. The plaintiff's Clerk in court sends to his client a list of the defendant's commissioners names, and receives instructions to whom of the defendant's commissioners the commission is to be directed. The defendant's clerk in court, in like manner, having received instructions from his client, to whom of the plaintiff's commissioners he would have the commission directed ; the plaintiff's Clerk in court, by note in writing, informs defendant's Clerk in court, he is ready *to strike commissioners names* : and the defendant's Clerk in court being prepared, and consenting, the commission-books are produced, and two of the names on each side are struck out with the pen by the respective Clerks in court ; the plaintiff's Clerk in court first striking out one of the defendant's commissioners names, the defendant's Clerk in court then strikes out one of the plaintiff's commissioners names, and so alternately, until the eight names are reduced to four. The plaintiff's Clerk in court makes out the commission for examination of witnesses (the order passed, entered, and served, being previously left with him), inserting the *four* commissioners names therein, which, when

|| *Prac. Reg.* 82.

* *Ord. Canc.* 47.

Rejoinder and joining in Commission. 299

sealed, he sends to his client to be executed. The form of a joint commission is as follows :

“ *GEORGE the Third*, by the grace of GOD, &c.
 “ To *John Smith, Edward Mayot, Thomas Warne, and John*
 “ *Henry Bateman*, Greeting. Know ye, That we, in con-
 “ fidence of your prudence and fidelity, have appointed
 “ you, and by these presents do give unto you, any §
 “ *three or two* of you, full power and authority, diligently
 “ to examine * [*all witnesses whatsoever*] upon certain inter-
 “ rogatories to be exhibited to you †, *as well on the part of*
 “ *Hugh Leycester, complainant, as on the part of Gilbert*
 “ *Venables, defendant, or of either of them*. And therefore
 “ we command you, any † *three or two* of you, that, at
 “ certain days and places to be appointed by you for
 “ that purpose, you do cause the said witnesses to come
 “ before you, and then and there examine each of them
 “ apart, upon the said interrogatories on their respective

§ Where there are several defendants, who have several Clerks in court, the words, “ *any two or more of you, &c.* ” are inserted, and those in italics omitted.

* In a commission to examine a witness *de bene esse*, the name of the party to be examined must be inserted thus, leaving out the words included within the brackets, *Sir John Cbetwode of Agdon in the county of Chester, Baronet, de bene esse*.

† Sometimes the commission is obtained on the part of the defendant, and the plaintiff joins therein ; then the words in italics are omitted, and in their place the following are inserted, “ *as well on the part of — defendant, as on the part of — complainant, or of either of them. And, &c.* ” Or if the commission be made out *ex parte*, the following words, “ *on the part of — against — And therefore, &c.* ” And the label is made to correspond with the tenor of the writ.

‡ Where there are several defendants, who have several Clerks in court, omit the words *three or two*, and in their place, insert any *two or more*.

“ corporal

300 Rejoinder and joining in Commission.

“ corporal oaths first taken before you, any three or two
 “ of you, upon the holy Evangelists; and that you do take
 “ such their examinations and reduce them into writing
 “ on parchment, and when you shall have so taken them,
 “ you are to send the same to us in our Chancery
 “ (*insert return*) wheresoever it shall then be closed up,
 “ and under your seals, or the seals of three or two of
 “ you, distinctly and plainly set together with the said
 “ interrogatories, and this writ. And we further com-
 “ mand you, and every of you, that before you act in or
 “ be present at the swearing or examining any witness or
 “ witnesses, you do severally take the oath first specified in
 “ the schedule hereunto annexed. And we do give you,
 “ any three, two, or one of you, full power and au-
 “ thority, jointly or severally, to administer such oath
 “ to the rest, or any other of you, upon the holy Evan-
 “ gelists. And we further command, that all and every
 “ the clerk or clerks, employed in taking, writing,
 “ transcribing or ingrossing, the deposition, or depositions,
 “ of witnesses to be examined, by virtue of these pre-
 “ sents, shall, before he or they be permitted to act as
 “ clerk, or clerks, as aforesaid, or be present at such ex-
 “ amination, severally take the oath last specified in the
 “ said schedule annexed. And we also give you, or any
 “ one of you, full power and authority, jointly and
 “ severally, to administer such oath to such clerk or clerks
 “ upon the holy Evangelists. Witness Ourselves at *West-*
 “ *minster*, the ——— day of ——— in the ——— year of our
 “ reign.”

Setwell, Winter.

Indorsed, *By order of court.*

Label. *To* (*insert commissioners*) *Gents,* any three or two of
 them, a commission to examine * witnesses, as well on the

* In a commission to examine a witness *de bene esse*, insert
 the name of the party to be examined thus, Sir *John Chetwode*
de bene esse.

Rejoinder and joining in Commission. 301

*part of Hugh Leycester, plaintiff, as on the part of
Gilbert Venables, defendant, returnable (without
delay) on fourteen days notice to the defendant.*

Sewell, Winter.

To this commission are annexed the following forms of oaths (printed upon parchment), to be administered to the commissioners, and to their clerks.

The Commissioner's Oath.

“ You shall, according to the best of your skill and knowledge, truly, faithfully, and without partiality to any or
“ either of the parties in this cause, take the examinations
“ and depositions of all and every witness and witnesses, produced and examined by virtue of the commission hereunto
“ annexed, upon the interrogations now produced, and left
“ with you. And you shall not publish, disclose, or make
“ known to any person or persons whomsoever, except to
“ the clerk or clerks by you employed, and sworn to
“ secrecy, in the execution of this commission, the contents of all or any of the depositions of the witnesses,
“ or any of them, to be taken by you and the other
“ commissioners in the said commission named, or any of
“ them, by virtue of the said commission, until publication shall pass by rule or order of the high court of
“ Chancery.”—So help you God.

The Clerk's Oath.

“ You shall truly, faithfully, and without partiality to
“ any or either of the parties in this cause, take and
“ write down, transcribe and ingross the depositions of
“ all and every witness and witnesses, produced and examined by the commissioners, or any of them, named
“ in the commission hereunto annexed, as far forth as you
“ are directed and employed by the said commissioners,
“ or any of them, to take, write down, or ingross the
“ said depositions, or any of them. And you shall not
“ publish,

302 Rejoinder and joining in Commission.

“ publish, disclose, or make known to any person or persons whomsoever, the contents of all or any of the depositions of the witnesses, or any of them, to be taken, wrote down, transcribed, or ingrossed by you, or whereto you shall have recourse, or be in any wise privy, until publication shall pass by rule or order of the high court of Chancery.” — *So help you God.*

These commissions are made returnable on a general return day, or on any day certain in term, and they are not unfrequently made returnable without delay; which return, if the commission be made out in term time, holds to the first return of the ensuing term; if made out in the vacation, to the last return of the subsequent term.

A commission returnable *sine dilacione*, if it be within the kingdom, must be returned by the second return of next term: if executed afterwards, it is void, and the depositions will be on motion suppressed. 2 *Vern.* 197. But this seems now to have been determined otherwise; for if a commission in *England* be taken out in the vacation, and has not a certain return, but only *sine dilacione*, it does not expire the first day of the following term, but may be continued in execution the whole of the next term to the last return. 3 *Atk.* 593.

By the rule of the court, the plaintiff is first intitled to the suing out and carriage of the commission to examine witnesses, and consequently the appointment of the time and place of executing it †. But if the defendant has witnesses to examine, who live beyond sea, where the plaintiff has none, it should seem otherwise: for in such case he shall have a commission granted him, for examining his witnesses only. And so he shall, if his witnesses live far distant from the plaintiff's, as sixty or eighty miles; or if, when the cause is at issue, the plaintiff will not go on to commission, the defendant may have a commission to exa-

† 1 *Pr. Alm.* 17. 3 *Atk.* 593.

mine his own witnesses, and shall have the carriage thereof; but in all these cases, the plaintiff may join in commission, and cross examine the defendant's witnesses, if he be so advised. And when the plaintiff commits any gross abuse in the execution of the first commission, the defendant shall have the carriage of the second, or where a commission, lost by him who had the carriage of it, is renewed, the other side commonly hath the carriage thereof. *Prac. Reg.* 83. *Toth.* 16. 3 *Pr. Alm.* 62.

In some cases, the court will indulge the defendant with an order for a duplicate of the commission, especially if it be doubtful whether the plaintiff will execute his commission or not, and more especially if he be forced on by the defendant, as in an injunction cause, where delay is generally the object of the suit, and where the plaintiff, who has the carriage of the commission, refuses to give notice of the execution, or does not intend to execute it, then the defendant may make use of his duplicate, and proceed to the examination of his witnesses.

When a commission is awarded to examine witnesses, if by default of him that hath the carriage of the commission, or by his commissioners nothing is done, he shall bear all the charges that the other side was put unto about that commission, either for fees of courts bringing or entertaining commissioners or witnesses, or otherwise, to be ascertained *before the Master* by the oath of the party, or of him that disbursed the money for him, and shall renew the commission at his own charges. *Ord. Canc.* 108.

When the parties have joined in commission, and struck names, they proceed to make out a joint commission to examine witnesses: but if the defendant's Clerk in court being served with the usual order "for a *subpœna* to rejoin, returnable immediately, and for a commission to examine witnesses," &c. and a *subpœna* to rejoin accompany the service of that order; after four days, exclusive of the day of service of the order and *subpœna*, the plaintiff's Clerk in court may, in strictness, call upon the defendant's Clerk

304 Rejoinder and joining in Commission.

Clerk in court to join in commission ; and upon neglect, or refusal, to give the commissioners names within *four days*, the plaintiff may take his commission *ex parte* : and in that case, notice of executing the commission is not necessary ; although this practice is in strictness regular, it is never closely adhered to, fair practitioners always allowing the adverse party a reasonable time to procure commissioners names ; nor will any Clerk in court be easily prevailed upon, so far to deviate from the courtesy which exists among themselves, as to enforce the strict line of practice before mentioned, without some urgent and special reason ; and the court would, on application, allow a defendant a reasonable time to procure commissioners names from the country.

Sometimes a party will join in commission, and afterwards refuse, or neglect, to strike commissioners names ; an application must in that case be made to the Master of the Rolls by petition (*vid.* Petition) to strike commissioners names, and his honour will, at his discretion, strike out two of the names, the four given by the petitioning party being inserted for that purpose in the petition ; but this proceeding will not prevent the petitioner's Clerk in court from striking out such two of the adverse party's commissioners as he would have done, had no such application been necessary ; and the commissioners names thus procured, are to be inserted in the commission to examine witnesses.

Commissioners ought to be indifferent persons : And after commissioners are struck, if it be discovered, that one or more of the commissioners is or are nearly allied, of council, solicitor *, master, or partner with the plaintiff, or defendant ; or any apparent cause of partiality, or siding

* One who has been Solicitor in a cause is not to be commissioner in the same cause. *Godb.* 193. *Fortescue v. Corke.* *Bunb.* 289.

with

Rejoinder and joining in Commission. 305

with either party, can be shewn, the court upon motion, or the Master of the Rolls upon petition, will order the opposite party to name commissioners *de novo*, in the place of one or more of them so complained against, or that the commission issue *ex parte*, because, tho' the commissioners are named by the party, yet that is but by way of proposal to the court, for they are the ministers of the court, and therefore must be impartial.

No commission to examine witnesses shall be executed in *London*, or within ten § miles thereof, without special order first obtained upon affidavit made of the party's inability to travel*, or other good matter, and all depositions taken by commission in *London*, or within ten miles thereof, without special order as aforesaid, shall stand superseded *ipso facto*, and not allowed to be read as evidence at the hearing of the cause. And the parties who shall cause the same to be executed shall suffer such punishment for their contempt and irregularity, as the court shall direct. *Ord. Canc. 109.*

The residence of witnesses beyond sea, or out of the jurisdiction of the court, whose testimony will be material to some of the parties in the suit, frequently occasions an application for a commission to examine witnesses abroad, and, if foreigners, in their own language.

This commission, like all commissions for the examination of witnesses, never issues but by order of court; the first and leading step towards obtaining an order for a commission of this nature is the making and filing an affidavit, stating that some of the witnesses whose evidence will be material, and whom it will be necessary to examine on the behalf of the party making the application (*plaintiff or defendant*),

§ The present practice is, to execute no commission to examine witnesses within twenty miles, which seems to have been the practice formerly. *Ord. Canc. 53.*

* *The Examiner will attend and examine a person so circumstanced, and a Master will go to the party to swear him to the interrogatories.*

306 **Rejoinder and joining in Commission.**

reside at ——— (*naming their place of residence*), and that the party cannot safely proceed to the hearing of the cause without the testimony of those witnesses. The order may be obtained by motion in court or petition to the Master of the Rolls: If the order be applied for by motion in court, notice in writing of the party's intended motion for a commission to examine witnesses at ——— (*the witnesses place of residence*) must be served on the adverse Clerk in court, by leaving a true copy of such notice with the Clerk in court personally, or with his agent at his seat in the Six-clerks office, on the day next but one before the motion is to be made, unless Sunday intervenes*. The affidavit being filed at the Affidavit-office, and an office copy thereof taken to read in court, when the motion comes on the court will exercise a discretion upon the case made to sustain the motion for a commission; and if the substantial justice of the suit require the testimony of the witnesses abroad, and the application be in a proper and early stage of the cause, the court seldom or never denies making an order as of course upon the affidavit before mentioned for a commission, with a return sooner or later according to the exigencies of the case, either *without delay*, or on a *general return* day in a future term, as mentioned in the notice of motion, or in the instructions to council. If the order for a commission to examine witnesses abroad be applied for by petition to the Master of the Rolls, the affidavit before stated must be annexed to the petition, and left at the Secretary's office in the *Rolls-yard*, and his honour will grant the prayer of the petition, as of course; the petition answered being taken and left at the Register-office, the order must be drawn up, passed, and entered at that office, and a true copy of the order so passed and entered must be served upon the adverse Clerk in court, in like manner as the notice of motion before mentioned. The or-

* It would be very proper to make and file an affidavit of service of the notice to obviate any inconvenience if the adverse party do not appear.

der for a commission to examine witnesses abroad states the affidavit, whereon the order is made, and then gives the party applying leave to sue out a commission to examine witnesses at ——— (their place of residence) returnable without delay, or on a general return day, with the usual directions *. Sometimes the order directs the defendant to name an agent to whom notice of executing the commission is directed to be given.

This order drawn up, passed and entered at the Register-office (the council's brief on the motion being left with Register for that purpose), after a true copy thereof has been served as before directed upon the adverse Clerk in court, the original order must be left with the party's Clerk in court making out the commission. The return of this commission to examine abroad may be *without delay*, or on a *general return day* in term †. The return depends upon the distance of place where the execution of the commission is intended to be had; if the execution be in the *East Indies*, the return of the commission must be so timed as to allow for the execution thereof, the delay of the voyage, and other incidental circumstances.

A commission to examine witnesses out of *England*, returnable *without delay*, *ex vi termini*, imports no definite time wherein the party is restricted to return the commission §; but this latitude of returning the commission must not be converted to oppressive purposes, for if the commission be not executed and returned within a reasonable time, due allowance being made for the distance and other concurrent circumstances of time and place, the court, upon application by motion, will interpose, if it appear that unnecessary or wilful delay has been occasioned; and probably, if it be a gross case, the court will so far interfere as

* Ante, 295.

† Without delay seems the better method.

§ A commission returnable *sine dilacione* to be executed in *England* has a certain return. 2 *Vern.* 197. 3 *Atk.* 593. *et vid.* 2. 301. of this work.

308 **Resolinder and joining in Commission.**

to make an order upon the party to expedite and return the commission by a limited time, or order publication to pass, and let the cause proceed on to a hearing ; for otherwise commissions of this sort might be obtained with a view to delay or defeat the ends of justice, which the court is ever jealous of, and *in limine* checks any proceeding tending thereto. When a commission is made returnable in term, on a general return day, the return is usually settled among the Clerks in court or Solicitors, or by the court if they differ : the order made upon the application for the commission generally appoints the return, which is always regulated according to the distance and difficulty of carrying, executing, and returning the commission.

The order being regularly drawn up, passed, entered, and served in manner before stated, commissioners names are to be applied for, as in the ordinary course of proceeding under an order for a commission to examine witnesses in *England*. It is usual, in commissions to examine witnesses abroad, to insert eight or more commissioners names ; this is done to obviate all accidents which might prevent the execution of the commission, by absence or death of any of the commissioners on either side *. The commissioners names are procured, or in default the commission taken *ex parte* pursuant to the directions of the order for the commission, in like manner as under the ordinary commission for examining witnesses in *England* and in the preceding pages of this work fully explained.

A commission to examine witnesses beyond sea, in a foreign language, differs in point of form from the ordinary commission for examination generally. The Clerk in court for the party obtaining the order makes out the commission for the examination of witnesses abroad, the form whereof is the same as for examination of witnesses generally, unless it be a commission to examine foreigners abroad in their own language, and a commission for that purpose is as follows :

* 3 *Atk.* 633.

Rejoinder and joining in Commission. 309

A Commission to examine Witnesses abroad and in a foreign Language.

GEORGE the Third, &c. To (commissioners) Greeting. Know ye, That we, in confidence of your prudence and fidelity, have appointed you, and by these presents do give unto you, *any two or more* of you, full power and authority, diligently to examine all witnesses whatsoever upon certain interrogatories to be exhibited to you, *as well on the part of A. B. complainant, as on the part of C. D. defendant, or either of them.* And therefore we command you, any two or more of you, that at certain days and places to be appointed by you for that purpose, you do cause the said witnesses to come before you, *or any two or more* of you, and then and there examine each of them apart, upon the said interrogatories, on their respective corporal oaths to be first taken before you, *any two or more* of you, solemnly*. And that you do take such their examinations and reduce them into writing on parchment, and when you shall have so taken them, you are to send the same to us in our Chancery (*without delay*), together with the said interrogatories and the certificate herein after described, wheresoever it shall then be, closed up under the seals of you, *any two or more* of you, distinctly and plainly set together with this writ. And we further command you, and every of you, that before any one of you act in or be present at the swearing or examining any witness or witnesses, you do severally take the oath first specified in the schedule hereunto annexed. And we give you, *any three, two, or one* of you, full power and authority, jointly or severally, to administer such oath to the rest, or any other of you, upon the holy Evangelists. And we further command, that all and every the clerk or clerks, employed in taking, writing, transcribing, or ingrossing the deposition or depositions of witnesses to be examined by virtue of these presents, shall, before he or they be permitted to act as clerk or clerks, as aforesaid, or be present at such examination, severally take the oath last specified in the said schedule

* Or according to the custom of the country.

310 Rejoinder and joining in Commission.

annexed. And we also give to you, or any one of you, full power and authority, jointly or severally, to administer such oath to such clerk or clerks, upon the holy Evangelists. And we do further give and grant unto you full power and authority, and do by these presents command you, that you, or any *two or more* of you, do, after you have so entered upon the execution of this commission, swear one or more interpreter or interpreters, upon his or their oath or oaths, solemnly well and faithfully to interpret the oath or oaths, and interrogatories which shall be administered and exhibited by either party, to any of such witnesses, who do not understand the English language; and also to interpret their respective examinations, and depositions, taken to the said interrogatories. And we further command and direct, that you, or any *two or more* of you, do certify to our Chancery, in what manner the oath or oaths shall have been administered by you, to the several witnesses respectively, who shall have been examined under the commission, and of what religion each and every of the said witnesses respectively is or are. Witness Ourself at *Westminster*, the 20th day of *June*, in the *twenty-third* year of our reign.

Sewell, Winter.

Indorsed, *By order of Court.*

Label. *To (commissioners) any three or two of them, a commission to examine witnesses abroad, at—— as well on the part of A. B. plaintiff, as on the part of C. D. defendant, returnable (without delay) on fourteen days notice to the defendant's commissioners (or such person as the order directs or the solicitors agree upon).*

Sewell, Winter.

To this commission are annexed the usual oaths printed upon parchment, for the commissioners and their clerks; the variation in the writ, when obtained on the part of defendant, or *ex parte*, are precisely the same as in the ordinary commissions *.

* Page 298.

Rejoinder and joining in Commission. 311

Commissions to examine Witnesses de bene esse

Are very usual where witnesses to a disputable fact are far advanced in years*, or in danger of dying before they can be examined in chief, so that there is a probability of losing their testimony; and where witnesses are going to *India*, or other remote parts §, from whence they cannot return in time to be examined in chief, or are foreign merchants, or sailors, and about to depart to their own country, in either of these cases, to prevent a failure of justice, the testimony of such witnesses may be preserved and taken by examination *de bene esse*. The reason why the court allows the taking depositions *de bene esse*, is either from a contempt in the party in not answering, and thereby preventing the joining of issue, or else where the party is in danger of losing the testimony of his witnesses, by any of the events before mentioned, so that there may be a ground to apprehend their not living, or *returning to England*, to be examined in chief; but if those witnesses do live, or *return*, and can be examined in chief, their depositions *de bene esse* fall to the ground, and are as it were buried, having answered the whole purpose for which they were taken †.

To authorize an application for leave to examine witnesses *de bene esse*, a suit must be previously instituted, and ordinarily the service of *subpœna*, to appear and answer, precedes the application for this examination, tho' this latter step in urgent cases may be dispensed with. A commission to examine witnesses *de bene esse*, issues always by order of court, obtained for that purpose, at the instance of either party, on motion in court or petition to the Master of the Rolls, grounded upon the Six-clerks certificate, of the bill

* A witness aged 70 years, verified by affidavit, is held to be of itself a sufficient ground to order him to be examined *de bene esse*. A witness was ordered to be thus examined, on affidavit that the plaintiff could not prove a material fact by any other person, though the witness was neither old, infirm, or going beyond sea. 3 *Wms.* 77. *Mof.* 389

§ *Prac. Reg.* 166. † 1 *Wms.* 563.

312 Rejoinder and joining in Commission.

being filed, and an affidavit of the party applying (plaintiff or defendant) stating the age, infirmity, &c. of the witness to be examined, that he is a material witness in the cause, and without whose testimony the party making the affidavit cannot safely proceed to the hearing of the cause, and the court will make an order as of course for the examination of the witness *de bene esse*. A plaintiff applying for leave to examine *de bene esse*, before *subpœna* served, gives no notice thereof to the defendant, an affidavit to the purport before mentioned is sufficient to found the application upon, and the examination *de bene esse* is ordered of course; so if a defendant be in contempt for not appearing or answering, no notice of motion is given to the party in the one case, or to his Clerk in court in the other, and notice in any case seems to be optional, for if the application be by petition to the Master of the Rolls, no notice can be given; but if the defendant has appeared, if the application be by motion, it is usual to give notice in writing to the Clerk in court. The examination *de bene esse* before process served, or where the defendant is in contempt for not appearing, is *ex parte*; in all other cases, the order to examine *de bene esse* must be served upon the adverse Clerk in court, by leaving a copy thereof with the Clerk in court personally, or with his agent, at his seat in the Six-clerks office; in both cases shewing the original order passed and entered, at the time of service, in order to give the adverse party an opportunity of inquiring into the regularity of the proceeding, as also in conformity to the order directing such notice, and for the party to join in commission, &c. by which he is intitled to cross examine the witness to be examined *de bene esse* if he be so advised; and as the order names the particular witnesses to be examined, any witness not named in the order cannot be examined without an order for the examination of such witness, and therefore it is that a party having witnesses to examine *de bene esse*, and a commission to that effect being obtained at the instance of the adverse party (in order to avoid the expence of another commission) will frequently
 apply

Rejoinder and joining in Commission. 313

apply for leave to examine such and such witnesses (naming them) at the execution of the commission, already obtained (by the adverse party) in the cause.

The order, after taking notice of the affidavit, gives the party applying (plaintiff or defendant) leave to examine such and such persons *nominatim*, as witnesses for him in the cause, *de bene esse*, with liberty to take out a commission for that purpose, with the usual directions*. The affidavit being filed, and the order drawn up, passed and entered, at the Register-office, is to be served upon the adverse Clerk in court, if an appearance has been entered, the subsequent procedure of joining in commission, &c. or suing out a commission *ex parte*, is, *mutatis mutandis*, the same as upon a general commission for examination of witnesses, and in the preceding pages of this work fully explained †.

The Clerk in court makes out the commission, the order for that purpose, being previously left with him. The commission, in point of form‡, is nearly the same as an ordinary commission to examine witnesses; generally the variation is occasioned by the order, directing the examination of a particular witness by name *de bene esse*, and not to examine witnesses generally, for if the witness after the cause is at issue be alive, or return from beyond sea, so as to be examined in chief, his deposition *de bene esse* cannot be regularly read, or published.

Examination of Witnesses.

THE *subpoena* to rejoin, or rejoining *gratis*, puts the cause completely at issue between the parties, and to prove the facts alledged by the pleadings on each

* Page 294, *ante*.

† Page 298, *ante*.

‡ Page 300, *ante*.

side is the next concern: This is done by examination of witnesses, and taking their depositions in writing upon interrogatories, or questions in writing, formed for that purpose, according to the manner of the civil law. Anciently the examination of witnesses was before a judge of the court, whose province it was to discriminate between a plain consistent narrative of facts, and a suspicious, unconnected, defultory tale. The examination in Chancery was originally before the Master of the Rolls, and therefore it should seem that the examination might be upon the bill without interrogatories drawn and framed as the Examination with the Canonists might be upon the *libellus articulatus*: The Master of the Rolls having left the examination of witnesses to his Clerks as the Barons of the Exchequer did to their Clerks, gave rise to interrogatories, or questions in writing drawn and framed by the council for the respective parties, whose witnesses were to be examined, for the purpose of substantiating the allegations on each side: from thenceforward the examination before the Judge fell into desuetude, and a practice arose, which since obtained, of examining by interrogatories exhibited in court at the Examiner's office, or before commissioners where a commission is necessary: for the purpose of examining witnesses within twenty miles of London, there is an Examiner's office appointed*; but for evidence

* The circuit within which the Examiners have exclusive right of examination, seems somewhat undefined, unless the subsequent orders of Chancery, made by Lord Clarendon and Sir Harbottle Grimston, may be said to have virtually annulled the precedent orders according to the rule of law, that *leges posteriores priores abrogant*. It appears from two orders made the 3d Nov. 11 Car. 1636. and 15 Oct. 1651. occasioned by differences between the Six-clerks, and the Examiners, stating among other abuses and encroachments, the taking out and executing commissions in or about London, contrary to the known rules and practice

evidence who live more than twenty miles from London, a commission to examine witnesses is granted of course,
to

practice of the court, that *no commission should be executed in, or within twenty miles of London*, as alledged by the Examiners. Lord Keeper Coventry, upon the first of these orders, declined making any decision, and ordered precedents to be searched. The second application underwent a similar fate from the Lords commissioners. The matter being thus left open and undetermined, Lord Clarendon and Sir Harbottle Grimston, after great deliberation, and with a view to reform and correct the abuses crept into the practice of this court, defined the exclusive right of examination of the Examiners, by making an order, "that no commission, *ad examinandum testes*, be executed in London, or within ten miles thereof, without special order first obtained, upon affidavit made of the party's inability to travel, or other good matter; and that all depositions taken by commission in London, or within ten miles thereof, without special order as aforesaid, shall stand suppressed and superseded *ipso facto*, and not allowed to be read as evidence, at the hearing of the cause. And the parties who shall cause the same to be executed, shall suffer such punishment for their contempt and irregularity as the court shall think fit." *Ord. Canc.* 109.

An idea in contradiction to this order has for many years prevailed; few or no commissions to examine witnesses are now executed within 20 miles of London.

The heavy expences attending the examination of witnesses by commission principally incurred by the extravagant entertainment of the commissioners and witnesses, seem to be a very strong argument in favour of the modern practice; and as a saving of expence is or ought to be an object in the prosecution of every suit, so the examination of witnesses should be at the Examiner's office, in all cases where it can be done with convenience, and at less expence than by commission. The examination at the Examiner's office of all witnesses resident *within twenty miles of London*, in exclusion to the examination by commission *within that district*, has by long use and acquiescence ripened into

an

to take the depositions there: so if witnesses reside beyond sea, a commission may be obtained to examine them there, upon their oaths, and if foreigners, upon the oaths of skilful interpreters †.

The examination of witnesses at the Examiner's office, or by commission, may be diversified, and considered under these several heads:

The examination of witnesses *originally*.

The *cross* examination.

The examination of witnesses *in perpetuam rei memoriam*.

The examination of witnesses *de bene esse*.

The examination of witnesses *to the credit* of a witness already examined.

A practice formerly obtained in certain cases, of examining witnesses to particular points after publication passed in the cause, *ad informandum conscientiam judicis*, or where at the hearing the court entertained doubts; and the depositions, thus taken, were delivered to the Lord Chancellor or Lord Keeper, sealed up, and were not to be opened or published but by consent or special order ‡. This mode of examination has been of late years disused; no examination of this nature appearing to have been taken within the present century: and the object of this work being a compilation of practical knowledge, according to the modern arrangement of practice, with a view to elucidate the course of the court as at present understood; this antiquated species of examination will be considered as obsolete, and consequently out of use.

an *universal and established practice*; and to prevent the improper use of commissions so near *London*, it were much to be wished the court would by some future order adopt and confirm it.

† It has been held that the deposition of an heathen, who believes in the Supreme Being, taken by commission in the most solemn manner, according to the custom of his own country, may be read in evidence. *Omychund v. Barker*. 1 *Atk.* 21.

‡ *Ca.* 37, 83. 1 *Ch. Ca.* 228. *Toth.* 23.

Interrogatories are questions in writing (which, and which only, are to be proposed to, and asked of, the witnesses in the cause) adapted to sustain the case made by the plaintiff or defendant exhibiting them, the testimony of whose witnesses is requisite to enable the court to do full and sufficient justice. These interrogatories must be short and pertinent, not leading or * directory, as, *Did not you see this?* or, *Did not you hear that?* For if they be such, the depositions taken thereon will be suppressed †, and not suffered to be read in evidence.

Interrogatories are termed *original*, when exhibited on the part of him who produces the witness; or *cross* interrogatories if filed on the behalf of the adverse party to examine a witness produced on the other side, and plaintiff or defendant may exhibit *original* or *cross* interrogatories.

The interrogatories were anciently annexed to the commission for examination of witnesses, and so now they are supposed to be: according to the present established practice, the interrogatories are usually delivered in to the commissioners, at the opening of the commission to examine witnesses; for the commissioners can examine only upon the schedule of interrogatories exhibited at the opening of the commission, and no new interrogatories can be exhibited before the commissioners without leave of the court ‡, because

* *Ord. Canc.* 173. 4 *Inst.* 279.

† If an interrogatory be leading, that is sufficient to suppress the deposition. 2 *Vern.* 472. *arg.*

‡ Where a commission is taken out for the examination of witnesses, there no new interrogatories, or set of interrogatories, can be exhibited, without motion and order of court; and the reason was said to be, because the commissioners are private persons, and not *sworn*, and are called plaintiff's commissioners, and defendant's commissioners, and therefore, without leave of the court, no new interrogatories can be added before them. *Proced. in Ch.* 386. *Pasch.* 1714. An order

because the commission is to examine upon such interrogatories as are supposed to be annexed to the commission, or such as are delivered in at the opening of the commission, which now come in the room of those formerly annexed. Before the Examiner the party might exhibit a new set of interrogatories, for that is supposed to be the examination in court by the Judge, and the Judge might have examined upon interrogatories *ex re natâ* out of the articles. The orders in Chancery made by *Lord Clarendon* and *Sir H. Grimston* seem to have new modelled this practice, by ordaining that "where witnesses are examined in court upon a schedule of interrogatories, there shall be no new interrogatories put in to examine the same witnesses." *Ord. Canc.* 103. but new interrogatories may be exhibited in court, for examining new witnesses at any time before publication, though there has been a joint commission executed in the country. And the court will, on motion, give leave on a supplemental bill to add to the first interrogatories, so as the new interrogatories contain nothing but what relates to the supplemental matter. *Prac. Reg.* 221.

The above order in its literal import conveys an idea, that no witness can be examined upon more than one schedule of interrogatories, and no new interrogatories can be put in or added to examine the same witness: and

order of court made by *Lord Macclesfield* and *Sir Joseph Jekyll*, reciting the inconvenience arising from the examination of witnesses before commissioners not sworn to secrecy, prescribes a form of oath to be taken by commissioners and their clerks, and orders that all the acting commissioners and their clerks take that oath before they act in any commission to examine witnesses, and that no commission issue without a clause peremptorily injoining the commissioners and clerks to take the oaths annexed before they act*. The objection therefore of the commissioners not being sworn is now removed; and if that be the only objection, *cessante causa cessat effectus*.

* *Ord. Canc.* 207.

the Practical Register lays down the same rule. This order, though conceived in very general terms, seems capable of not quite so strict an interpretation : Witnesses formerly were examined frequently twice, and to the same point. The irregularity of examining *twice to the point before examined to*, seems to be the object to which the order was intended to apply. Witnesses now are examined twice, but *never to the same point to which they were formerly examined* ; and this appears to be the spirit of the order, though not within the letter. And it is not improbable but this was the idea of Lord *Harcourt* (and not that of the Examiner, being an officer of credit, and sworn as mentioned by the Reporter), when in a case before him contrary to the letter of the order he determined, that where interrogatories are exhibited in the Examiner's office, and witnesses examined thereon, either party may without application to the court, or order for that purpose, exhibit one or more interrogatories, or a new set of interrogatories for further examination of the same or other witnesses ; because the Examiner is an officer of credit, and sworn, and therefore presumed to be impartial, and that he will not disclose the depositions to either party. *Preced. in Ch.* 386. *Pasch.* 1714.

“ No interrogatories shall be exhibited for the examination of any witnesses, in any cause depending in this court, whether in court in the Examiner's office, or by commission in the country, before such interrogatories shall be either drawn or perused by council (after due consideration had of the pleadings) and signed by them. And all depositions taken contrary thereto, shall stand suppressed.” *Ord. Canc.* 173.

A transcript of the interrogatories as drawn or perused, and signed by council, are to be fairly ingrossed upon parchment, each skin of which must have an half crown stamp. The interrogatories thus prepared are to be left at the Examiner's office with some one of the Examiners, or, if the examination of the witnesses be by commission, produced

duced before the commissioners at the opening of the commission to examine witnesses.

The plaintiff's Clerk in court immediately after the cause is at issue by *subpœna* or appearance *gratis*, to rejoin, if the plaintiff's witnesses live and reside within twenty miles of *London*, usually files interrogatories * in the Examiner's office, and proceeds to examine such of the plaintiff's witnesses who reside within twenty miles of *London*. After some of the witnesses have been examined, or before, the plaintiff's Clerk in court enters a *rule to produce witnesses* in the house book of the Six-clerk's office, in that Six-clerk's division where the cause originally began. All rules expire that day se'enight on which they are given. The entry therefore of this rule must be so timed in full term, that there may be eight days at least before the end, and exclusive of the last day of the term †. The rule must be likewise entered in the house-book of that division to which the Clerk in court giving the rule belongs, for either plaintiff or defendant's Clerk in court (whose answer is replied unto) after the cause is at issue by *subpœna*, or appearance *gratis*, to rejoin, may immediately enter a rule to produce witnesses, and proceed to examine. The rule is entered in the following form, in the house-book of the Six-clerk's office, and a transcript thereof made in the rule-book of the Clerk in court entering the rule, the Clerk in court takes his book to the Register, who marks the entry of the rule, by setting his initials in the margin of the book against the transcript of the rule in the book, one shilling and

* If the party examine some witnesses in town, and others by commission in the country, he is not obliged to file or exhibit his whole set of interrogatories in the Examiner's office, he only files such as he hath occasion to examine the witnesses upon in town; for, if it were otherwise, it would put the plaintiff to a double expence, by paying for copies of the whole interrogatories twice over.

† *Prac. Reg.* 319.

four pence is paid to the Register for entering the rule. The Clerk in court entering the rule, by note in writing, left at the seat of the adverse Clerk in court, informs him that a rule to produce witnesses is entered.

Egerton } 20 June, 1783.
v. } A day is given to the (plaintiff or defend-
Dutton. } ant) to produce witnesses.
Radcliffe Clerk for (plaintiff or defendant)

The parties being thus at issue, “ proceed to examine
“ witnesses, and the interrogatories being perused with
“ care that the same be pertinent, and only to the points
“ necessary; the witnesses are to be sorted, and examined
“ on those interrogatories only that their testimony doth
“ extend unto, without the needless interrogatories of
“ matters unnecessary or immaterial, as well to avoid the
“ charge of both parties, plaintiff and defendant, in super-
“ fluous examinations, as the apt interrogatories (which are
“ the life of the cause) may be exhibited. *Ord. Canc. 103.*

“ No witness shall be examined in court by the Exa-
“ miner, without the privity of the adverse party, or of
“ his clerk, who deals for the adverse party, to whom the
“ person to be examined shall be shewed, and a note of his
“ name or place of dwelling delivered in writing, by such
“ as shall produce him : and the Examiner is to take care,
“ and be well satisfied, that such notice be given, and
“ then shall add to the title of the witnesses examination,
“ the time such notice given, and the name of that per-
“ son to whom it is given, and by whom, that at the
“ hearing of the cause, the suitor be not delayed upon
“ pretence of want of notice. *Ord. Canc. 103.*

“ When any witness shall be brought to any Clerk in
“ court, to be shewed before he be examined, the party
“ that produceth him, shall not only leave a note in writ-
“ ing of the name and title of such witness, and the pa-
“ rish where he lives; but if such parish shall happen to

“ be any of the parishes within the bills of mortality, such
 “ note shall also contain what street and house in such
 “ parish such party lives, and whether he be a house-
 “ keeper or a lodger, to the end such witness may with
 “ more ease be enquired after, and cross-examined, if re-
 “ quired : And the clerks are to take care to see this or-
 “ der performed. *Ord. Canc. 164.*”

It was before observed, that the Examiner's office extends it self, and has an *exclusive right* to examine all witnesses residing in *London*, or within twenty miles, which is the circuit of the court: when a witness therefore residing within that district is to be examined, interrogatories properly ingrossed are first to be left with some one of the examiners, at his seat in the Examiner's office; this is termed *filing interrogatories*. When a witness attends to be examined, a clerk from the Examiner's office accompanies the witness to the publick office to be sworn to the interrogatories before the sitting Master there, or before any other Master out of office hours, the oath is administered in the usual manner, the form whereof is as follows :

*You shall true answer make to all such questions as shall be
 asked of you on these interrogatories, without favour or
 affection to either party, and therein you shall speak the
 truth, the whole truth, and nothing but the truth,*

So help you God.

A *jurata* stating the producing and swearing of the witness to the interrogatories with his name, the day, and year when sworn, is inscribed upon the interrogatories, to which the Master before whom it is sworn subscribes his name.

The witness, previous to his examination, must be produced in person, and shewn at the seat of the adverse Clerk in court, in the Six-clerks office, and a note in writing of his name and place of abode left at the Clerk in court's seat. This is done as well to give an oppor-

tunity to the other side of cross-examining the witness if it be thought adviseable ; as also to prevent the personation of a witness : the witness thus sworn, and produced at the Clerk in court's seat, returns back to the Examiner's office, and is there examined. After the witness is fully examined, the depositions are read over to him, and the witness is at liberty to amend or alter any thing, after which he signs them, and then (and not before) the examination is compleat and good evidence *. The Clerk in court, at whose seat the witness is produced, sends the note of the name and residence of the witness to his client, and if it be necessary to cross-examine that witness, and cross interrogatories for that purpose be filed, the party producing the witness is obliged to procure him to stay or return to be examined : but as it is usual, after the witness is sworn, for the Examiner to appoint some other day for him to attend to be examined ; to prevent the examination being taken unknown to the other side, a note in writing may be stuck up in the Examiner's office, that if *such a person* come to be examined in *such a cause*, let him be cross examined ; or the Examiner may be instructed to take care that the witness be cross examined, which seems the better method. Where the interrogatories for cross-examining a witness are not filed, or the witness is not required to be cross-examined whilst he is under original examination, but permitted to depart about his business, the party who intends to cross-examine that witness, must procure his examination in the best manner he can : the adverse party is not bound to produce him again, to attend to be cross-examined, since it was the party's own *laches* he had not the cross interrogatories ready whilst he was under the original examination.

* Where a witness dies after examination, but before such examination is signed by him, the depositions cannot be made use of. 1 Wms. 414. *Copeland v. Stanton.*

For preventing of perjury, and other mischiefs often appearing to the court, the Examiner is to examine the deponent to the interrogatories directed *seriatim*, and not permit him to read over or hear read any other interrogatories until that in hand be fully finished; much less is he to suffer the deponent to have the interrogatories, and pen his own depositions, or depart after he hath heard an interrogatory read, until he hath perfected his examination thereunto. *Ord. Canc.* 105.

And if any witness shall refuse so to conform himself, the Examiner is thereof to give notice to the Clerk of the other side, and to proceed no further in his examination without the consent of the said Clerk, or order made in court to warrant his so doing. *Ibid.*

The Examiners (in whom the court reposeth great confidence) are themselves in person to be diligent in examination of witnesses, and not intrust the same to mean and inferior clerks; and are to take care to hold the witness to the point interrogated, and not run into extravagancies, and matters not pertinent to the question, thereby wasting paper for their own profit, of which the court will expect a strict account. *Ibid.*

The Examiners are to take care that they employ under them in their office none but persons of known integrity and ability, who shall take an oath not to deliver or make known, directly or indirectly, to the adverse party, or any others, save the deponent, who comes to be examined in any of the interrogatories delivered to be examined upon any Examination by him taken, or remaining in the Examiner's office, an extract, copy, or breviate thereof, before publication be thereof passed, and the copies thereof taken. And if any such deputy-clerk, or person so employed, shall be found faulty in the premises, he shall be expelled the office; and the Examiner who so employed him shall be also answerable to the court for such misdemeanour, and to the party grieved for his costs and damages sustained thereby. And such Solicitor or other person who shall be discovered

to have a hand therein, shall be liable to such censure as the court shall find just to inflict upon him. *Ibid.*

In examining of witnesses, the Examiner shall not use any idle repetitions, or needless circumstances, nor set down any answer to the question to which the examinant cannot depose other than thus: *To such an interrogatory this examinant cannot depose.* And in case such impertinencies be observed by the court, the Examiner is to recompence the charge thereof to the party grieved, as the court shall award. *Ibid.*

The Examiner is not strictly bound * to the letter of the interrogatories, but ought to explain every other matter or thing which ariseth necessarily thereupon, for manifestation of the whole truth. 4 *Inst.* 278.

The Examiner, after the examination begun, ought not to confer with either party touching the examination, or take new instructions concerning the same. *Ibid.*

Forasmuch as the witness by his oath, which is so sacred, calleth Almighty God (who is truth itself, and cannot be deceived, and hath knowledge of the secrets of the heart) to witness that which he shall depose, it is the duty of the

* *J. H.* and another, were commissioners to examine defendant upon interrogatories drawn by plaintiff, and defendant being examined would have declared the whole truth, which *J. H.* being a commissioner chosen by the plaintiff, would not suffer him to do, but held him strictly to the interrogatories, so that the truth could not appear. And *per totam curiam.* It is a great misdemeanour, and a murdering of the truth and right, as the statute of *Exeter* speaks, *Et per quod justitia et veritas suffocantur,* as it is said in *Capite Itineris.* And commissioners ought to be indifferent, and by all means to express the truth; and they are not strictly tied to the words of the interrogatories, but to every thing also which necessarily ariseth thereupon for the manifestation of the whole truth concerning the matter in question. And for this misdemeanour, the Attorney-General was ordered to prefer an information against him. *In Cam. Stell.* 9 *Rep.* 70. *Peacock's Case.*

Examiner gravely, temperately, and leisurely, to take the deposition of the witnesses, without any menace, disturbance, or interruption of them in hindrance of the truth, which are grievously to be punished. And after the depositions taken, the Examiners ought to read the same distinctly to the witnesses, and suffer them to explain themselves for the manifestation of the whole truth. *Ibid.*

No re-examination of a witness upon the same interrogatory, and that he spoke uncertainly on the first examination, is to be without leave of court. So if a witness be examined by commissioners in the country, he shall not be examined again here in court without special order. *Prac. Reg.* 163, 165.

When there is reason to suppose a witness will not voluntarily attend to be examined, recourse must be had to compulsive process of *subpœna ad testificand.* which commands the witness to whom it is directed, laying aside all pretences and excuses, to appear before the Examiner, to testify on the behalf of the party requiring his testimony.

To obtain this writ, a *præcipe* must be left at the *Subpœna-office*, in the following form :

Subpœna Geoffrey Stiles to appear in Chancery, returnable immediate, to testify on the behalf of *William Stradling*.

testified 12 July, 1783.

Radcliffe Solicitor.

This *præcipe* being left at the *Subpœna-office*, the writ is made out in the following form, which, when sealed, the Solicitor calls for at the same office.

Subpœna to testify before the Examiner.

“ George the Third, &c. To Geoffrey Stiles, greeting.
 “ For certain causes offered before us in our Chancery, We
 “ command and strictly injoin you, that laying all other
 “ matters

“ matters aside, and notwithstanding any excuse, you
 “ personally be and appear before us in our Chancery, *im-*
 “ *mediately after the receipt of this writ*, wheresoever it shall
 “ then be, to answer concerning those things which shall
 “ be then and there objected to you; and to do further,
 “ and receive what our said court shall have considered in
 “ this behalf: and this you may in no wise omit, under the
 “ penalty of one hundred pounds; and have there this writ.
 “ Witness Ourself at *Westminster*, the *twelfth* day of *July*,
 “ in the *twenty-third* year of our reign.”

Courtenay and Courtenay.

Indorsed By the court to testify on the behalf of *William Stradling*.

Label. *Geoffrey Stiles* to appear in Chancery, returnable immediate, to testify on the behalf of *William Stradling*,

Courtenay and Courtenay.

The number of witnesses to be inserted in one *subpœna ad testificand.* is restricted to three. Husband and wife are considered as two distinct persons, and her Christian and surname must be inserted accordingly. This writ is made returnable immediate of course. The service of this *subpœna* must be in all cases *personal*; if there be one witness only, then the process itself should be left with the witness*. When there are two witnesses, a label must be personally served upon one, shewing at the time of such service the process itself under seal, and the process under seal must be personally served upon the other witness last served. If there be three witnesses (no *subpœna* can contain more) labels must be *personally* served upon two of them, shewing the process under seal at the time of service, and the writ itself *personally* served and left upon the party last served; and in that case the person serving the process should take a

* *Mar. 19. pl. 43.*

copy of the label, in order to enable him to make an affidavit of service of the writ; at each of the services upon the several witnesses, one shilling conduct-money should be tendered. This writ appoints no time or place whither the witness is to resort for examination; it is therefore necessary to serve him with a notice in writing, appointing the time and place of examination; this notice should accompany the service of the *subpœna*. The notice may be in the following form:

“ In Chancery,

“ Mr. *Geoffrey Stiles*.

“ Take notice, that by virtue of a writ of *subpœna* issuing out, and under the seal, of the high court of Chancery to you directed, and herewith shewn (or left *) you are hereby required to appear personally before *John Henry Bateman*, one of the Examiners of the said court, on *Monday* the 15th day of *July* instant, by ten of the clock in the forenoon of the same day, at the Examiner's office, in the Rolls-yard, *Chancery Lane*, in the county of *Middlesex*, to testify the truth, according to your knowledge, in a certain cause now depending between *James Manwaring*, Esq; plaintiff, and *Edmund Vernon*, Esq; defendant, on the part of the said defendant. Dated the *eighteenth* day of *July*, 1784.

“ To Mr. *Geoffrey Stiles*, } *H. Leigh*,

“ at —

} Solicitor for the said defendant.

The service of this writ should be a reasonable time before the day appointed for the examination of the witness, but no witness unless his reasonable expences be tendered him is bound to appear at all: nor, if he appear, is he bound to give evidence, until such charges are ac-

* This must be adapted to the service of the writ, whether by delivering the body under seal, or a label shewing the body under seal at the time of service of the label.

tually paid him, except he reside within the bills of mortality, and is summoned to give evidence within the same.

A witness thus served with *subpœna* to testify, and notice as before stated, if he neglect or refuse to attend to be examined, a certificate of the *interrogatories being filed, and that the witness has not attended to be sworn to the interrogatories*, must be obtained from the Examiner, and an affidavit made and filed (at the Affidavit-office) of the personal service of the *subpœna* to testify, and notice in writing delivered at the same time. An application is next to be made by motion of course, in court, *that the witness do at his own expence attend, and be sworn and examined in four days, or that he may stand committed to the Fleet-prison*. The court, upon hearing the certificate and affidavit of service read, will make an order upon the witness that he attend the Examiner and be examined to the interrogatories filed, in four days after personal service of the order, or in default that he stand committed to the *Fleet* prison. The council's brief being left at the Register-office the order will be drawn up, and being passed and entered at the same office, a copy of the order so passed and entered must be personally served upon the witness, shewing the original order at the time of service; if the witness obstinately persist in such neglect or refusal to attend, an affidavit of the personal service of the order must be made and filed, and a certificate procured from the Examiner, *that the witness has not attended to be sworn to the interrogatories*, the court upon a further application by motion of course will make an order for the commitment of the witness to the *Fleet*-prison; the affidavit of personal service of the former order and the certificate from the Examiner being read in court at the time of the motion. The council's brief on the motion being left at the Register-office, and the order thereon drawn up, passed and entered at the same office, the order itself must be delivered to the tipstaff attending the court, who will thereupon procure a warrant from the Chancellor's secretary,

tary, and being instructed as to the person and residence of the witness, will apprehend and convey him to the Warden of the *Fleet* prison: where he will remain in custody not only until he has been examined upon the interrogatories, but also until payment of costs to the party requiring his testimony, to be taxed by a Master, and likewise the tipstaff's and warden's fees for taking and detaining him. A witness thus dealt with, after he has put in his examination to the interrogatories, upon motion or petition, tendering or paying all costs, and certificate from the Examiner of the examination being taken and complete, will be discharged by the court, or the Lord Chancellor or Master of the Rolls if the court be not sitting: or he may be discharged by the party at whose instance he was committed, if the Warden of the *Fleet* can be prevailed upon to take such a discharge.

The method is *mutatis mutandis* the same, when a witness is sworn to the interrogatories and afterwards refuses or neglects to attend the Examiner to be examined upon the interrogatories.

This compulsory process to bring in unwilling witnesses, and the additional terrors of a commitment in case of disobedience, are of excellent use in the thorough investigation of truth.

If a person, whose testimony is material on the behalf of any party to a suit, be confined in prison, within twenty miles of *London*, the situation of the witness must be represented to the sitting Master at the publick office, or any other Master * in his absence, requesting the Master's attendance at the prison, before whom the witness may be sworn to the interrogatories. A notice in writing specifying the title of the cause, the name and place of confinement of the witness, and the party's intention of examining that witness on *such a day*, must be served upon the adverse Clerk in court, by leaving a copy of
such

* A Master extraordinary cannot administer an oath within 20 miles of *London*, *Ord. Canc.* 121.

such notice with the Clerk in court personally, or with his agent, at his seat in the Six-clerk's office, two days previous to the examination of the witness, in order to give the adverse party an opportunity of cross-examining that witness, if he be so advised. The Examiner (with whom the interrogatories for the examination of the witness should be previously left) must be informed of the time and place when and where the Master will attend; the Examiner usually accompanies the Master, bringing with him and producing the interrogatories filed in the Examiner's office, and the witness being sworn thereto in the common form, the examination is taken in the usual manner, and the depositions and interrogatories returned by the Examiner to the office, to be kept, as in ordinary cases, until publication pass in the cause.

In like manner, a witness residing within twenty miles of London, incapable by sickness of attending the Examiner's office to be examined, is attended at his place of abode by the Master, to be sworn to the interrogatories, and by the Examiner to be examined. A notice in writing of the title of the cause, the name and place of abode of the witness, and the day and place where the witness is intended to be examined, and on whose behalf, must be served upon the adverse Clerk in court personally, or left at his seat in the Six-clerks office with his agent, two days previous to the examination of such witness, to give the other side an opportunity of cross examining the witness, if thought necessary.

If the Examiner be served with a copy of the rule or order, whereby publication is to pass on such a day, he cannot after publication examine any witness*, though it often falls out, that three or four witnesses have been before that time sworn to the interrogatories, but have not

* Ord. Canc. 104. *So that before such notice to the Examiner, it seems he may proceed on with the examination, and a copy of the rule or order to pass or enlarge publication ought to be in all cases served upon the Examiner, in the same manner as upon the Clerk in court.*

attended to be examined; in such case, the party cannot examine them without enlarging publication by leave of the court, and this may be done by order of court obtained on motion or petition, accompanied with an affidavit made by the party applying, his Clerk in court (if necessary) and Solicitor joining therein*, "That neither
 " they or either of them, nor any person or persons by
 " or with their or either of their direction, privity or
 " knowledge, have read, seen, heard read, or been in-
 " formed of any the purport or contents of the depositions
 " already taken in the cause, and that till the witnesses
 " (he desires) be examined (if the court please to order
 " they shall be so) they nor either of them will not will-
 " ingly read, see, hear read, or be informed of the same;
 " nor shall any person or persons, by or with their or
 " either of their order, privity, direction or knowledge,
 " read, see, hear read, or be informed of the same until
 " publication shall pass by the further order of the court in
 " the cause †." The affidavit being made and filed, and an office copy thereof taken to be read in court; the court, upon the application, seldom denies to make an order as of course to enlarge publication, and give the party thus circumstanced an opportunity of examining his witnesses; but this enlargement of publication is to be *sub modo*, where no injury may arise to the adverse party, such as not to hinder the plaintiff from setting down his cause, or where the party is not served with

* If the party reside above twenty miles from *London* he may make his affidavit there before a Master extraordinary, and the Clerk in court and Solicitor may swear their affidavit at the public office

† An affidavit was, That he had not seen, &c. nor would or should *any for him*, &c. *see, &c.* The court ordered the party to amend the affidavit (if he thought fit to apply), and add, that he (also) *would not see*, &c. if he meant to have what he moved for granted. *Prac. Reg.* 162.

process

process to hear judgment; and although the cause be set down, and *subpœna* to hear judgment served, yet if it be shewn that the cause will not probably come on to be heard at a day near at hand, the court will exercise a discretion, according to the situation and circumstances of the cause, and probably indulge the party with a further time to examine his witnesses, sometimes obliging a party defendant to appear *gratis* to hear judgment.

Upon such affidavit, after publication has actually passed, and some good cause shewn, either by affidavit, or certificate from commissioners, under a commission for examination of witnesses in the country, why the party applying could not get his witnesses examined in the ordinary time, leave is frequently granted to examine by a time prefixed, provided the party shall not in the mean time see, &c. any of the former examinations. *Toth. 22. Prac. Reg. 162.* And in such case also affidavit must be made, that he hath several, or such and such material witnesses to examine, who for such and such reasons he could not examine at the execution of the commission in the country, and that he has not seen, &c. *Px. Alm. 25.*

Where any person, plaintiff or defendant, shall ground any motion or petition, on an affidavit of material witnesses to examine, whereby to gain longer time to examine, such affidavit shall not only contain the names of the chiefest of such witnesses, but the points on which such witnesses are desired to be examined, to the end the court may see whether such points be material to be examined, and whether before or after hearing, that all delays heretofore occasioned by unnecessary examination may be avoided for the future. *Ord. Canc. 166.*

If a witness be examined by commissioners in the country, he shall not be examined again here in court, without special order. *Cl. Inst. 15. Prac. Reg. 163.*

New interrogatories may be exhibited into court for examination of *new* witnesses at any time before publication, although there have been joint commissions formerly executed in the cause. *Ord. Canc. 33.*

It

It was before observed, that anciently the examination of witnesses was before the Master of the Rolls upon the *libellus articulatus*, and that interrogatories in writing for the examination of witnesses, were the consequence of delegating that office to clerks; but as witnesses were sometimes aged, infirm, or lived remote from the court, it was thought more convenient to appoint commissioners to examine such witnesses *, the court sending a notary of their own, who was often in commission with them (long since disused), and with those commissions they sent a copy of the bill. Those commissioners must examine of themselves, and cannot delegate their power, according to the maxim of law, that *delegata potestas non potest delegari*.

The modern orders of court by Lord Clarendon and Sir Harbottle Grimston have proscribed the examination of any witnesses by commission within ten † miles of London, unless in certain cases, and a long and approved line of practice has extended that distance to twenty miles.

The commission for the examination of witnesses being procured as before-mentioned ‡, is sent by the Clerk in court to his client the Solicitor for the party plaintiff or defendant, obtaining the commission: the Solicitor, upon receipt of the commission, apprizes *his own* commissioners of the nature and method of proceeding upon the commission, and keeps it unopened until the day appointed for the execution thereof: the time and place of executing the commission being settled among themselves; if it be a joint-commission, the Solicitor for the party who has the carriage of it must procure a notice in writing to be subscribed by two of his commissioners, appointing

* Commissions to examine witnesses by the ancient ordinances and constitution of the court, were not to be granted but for age, infirmity, or remote distance of place. *Prac. Reg.* 85. *Ord. Canc.* 9.

† *Ord. Canc.* 109.

‡ *Ant.* p. 298.

the time and place of execution, and directed to those parties to whom by the label of the writ notice is directed to be given.

This notice in writing must specify the title of the cause, the time when, and the place where the execution of the commission is appointed to be held, it must also be served upon all the parties joining * in the commission personally, or left at their respective dwelling houses or places of residence with one of the family, *ten days in the Easter vacation, and fourteen days in any other vacation*, previous to, and exclusive of the day appointed for the execution of the commission.

The notice may be in the following form :

“ We whose names are hereunto subscribed, having received a commission, issuing out of and under the seal of the high court of Chancery, to us and others directed, for the examination of witnesses, in a certain cause there depending between *William Stiles* plaintiff, and *John Stradling* defendant ; this is to give notice, that we will execute the said commission on the behalf of the plaintiff (or defendant) at the house of — known by the sign of — situate at — in the county of — on *Monday* the 15th day of *July* instant, at the hour of *eleven o'clock in the forenoon* of the same day, when and where you and your commissioners and witnesses may be present if you please. Dated the 1st day of *July, 1783.*”

To Mr. *John Stradling* }

John Radcliffe.
Charles Farnaby.

The witnesses to be examined at the execution of the commission, may be produced by summons from the com-

* A party whose answer is not replied unto, is never called upon to join in commission ; his answer being taken as true, he never can obtain, nor is there there any reason for him to apply for a commission.

commissioners, if they will voluntarily attend, or summons, and *subpoena* to testify, if it is supposed they will neglect or refuse to attend upon a summons merely.

The summons may be in the following form :

The Commissioners Summons for Witnesses.

“ In Chancery,

Stradling and others, plaintiffs,

Between

v.

Stiles and others, defendants.

“ Whereas we have received a commission, issuing out
 “ of and under the seal of the high court of Chancery,
 “ to us and others therein named directed, for the
 “ examination of witnesses, in a cause in the said court
 “ depending, between *Geoffrey Stradling* and others plain-
 “ tiffs, and *William Stiles* and others defendants. And
 “ whereas we are informed, that you whose names are
 “ here under written are material witnesses for the (*plain-
 “ tiffs or defendants*), we therefore, by virtue of the said
 “ commission, will and require you and every of you, se-
 “ verally and personally to be and appear before us the said
 “ commissioners, or any two or more of us, at the house
 “ of —, known by the name or sign of — situate in
 “ — in the county of — on *Monday* the 15th day of *July*
 “ instant, at the hour of ten of the clock in the forenoon,
 “ then and there to be examined, and to testify the truth
 “ according to the best of your knowledge, for and on
 “ the behalf of the said (*plaintiffs or defendants*), and you
 “ are then and there to attend, and not depart until you
 “ have been examined on the part of the said (*plaintiffs or
 “ defendants*), and herein you are not to fail. Dated, &c.”

To *George Jones, Richard Heighway,* } *John Radcliffe.*
Samuel Pilgrim, and Arthur Whetham. } *Charles Farnaby.*

These summonses must be signed by two or more of the commissioners, and directed to the witnesses by name, and personally served upon and left with them severally and respectively, a *reasonable time* before the execution of

the commission, with one shilling conduct-money, but if a witness reside at any great distance from the place where the commission is to be executed; his *reasonable* expences must be paid or tendered to him, otherwise he is not bound to appear* at all, nor if he appear, is he bound to give evidence until his *reasonable* expences are actually paid or tendered to him. No process of contempt lies upon a disobedience of this summons, no writ under seal being directed to the witness, and, therefore it is, that a summons should be served upon such witnesses only whose attendance can be depended on. It seems however, that the court in aid of the commissioners summons might so far interpose, where a witness has been duly served with the commissioners summons to give evidence, and neglected or refused to attend the commissioners; as upon motion grounded upon a certificate in writing by the acting commissioners of the non-attendance of a witness duly summoned, supported by an affidavit made and filed of the *personal* service of the commissioners summons, and *reasonable charges* tendered or paid if demanded, to make an order upon the witness, at his own expence to attend the examiner at the Examiner's office, and be examined within a limited time after service of that order or in default that he stand committed to the *Fleet Prison*. The counsel's brief on this motion being left at the Register-office, and the order drawn up, passed and entered at the same office, a true copy of the order so passed and entered, is to be served upon the witness *personally* shewing at the time of service the original order passed and entered. Interrogatories for the examination of the witness being previously filed at the Examiner's office, if the witness after *such* service of the order, neglect or refuse to attend and be examined, and shew no cause to the contrary, before the expiration of the time limited by the order; a certificate should be procured from the Examiner

* Str. 1054.

that the witness has not attended to be examined, and an affidavit made and filed of the *personal* service of the order, the court upon motion to commit the witness, and hearing the certificate and affidavit of service of the order read, if sufficient cause be not shewn on the part of the witness, will make an order for the commitment of the witness to the *Fleet Prison*. The counsel's brief as before being sent to the Register's office, and the order made thereon, drawn up, passed and entered there, the original order must be delivered to the 'Tipstaff' of the court, who will thereupon obtain a warrant from the Lord Chancellor's Secretary, and with proper instructions from the Solicitor, apprehend the witness, and deliver him into the custody of the Warden of the *Fleet Prison*, from whence he will not be discharged, until he has conformed to the examination required, and paid all costs. But if any irregularity has been incurred in the service of either the summons or orders, or *reasonable* expences have not been tendered, or paid to the witness when demanded, he may and should *in limine* come in and shew cause upon the first order, and if the cause assigned be sufficient, the order will be discharged, and perhaps with costs.

The better and most usual and certain mode of compelling an unwilling witness, or whose attendance is doubtful, is by *Subpœna ad testificandum*. For this purpose a *Præcipe* must be left at the *Subpœna* office in the following form : *

* *Where there are more than three witnesses on the behalf of the same party, a distinct Præcipe for each set of witnesses, arranging the names of the witnesses thus, would save infinite mistakes at the Subpœna office.*

Subpœna John Doe, Richard Roe, and John Smith to appear
(as above) on the behalf of Geoffrey Stradling.

Subpœna John Cox, Thomas Hall, Mary Jones, to appear (as
above) on the behalf of Geoffrey Stradling.

Chester Solicitor.

Dated (as above.)

Subpœna

Subpœna *Jarvase Jones* to appear before *Maurice Bateman* and others, commissioners at such times and places as the bearer hereof shall appoint, to testify on the behalf of *Geoffrey Stradling*.

Chester Solicitor.

Tested 10 July, 1783.

The Form of a Subpœna to testify is as follows:

“ *GEORGE* the third, &c. to *Jarvase Jones* greeting, we command and strictly enjoin you, that laying
“ all other matters aside, and notwithstanding any excuse
“ you personally be and appear before *Maurice Bateman*
“ (*one of the commissioners*) and others commissioners appointed in our Chancery, at such times and places as
“ the bearer hereof shall appoint to testify the truth in
“ a certain cause depending in our said court on the behalf of *Geoffrey Stradling*, and this you may in no wise
“ omit, under the penalty of one hundred pounds.
“ Witness ourself at *Westminster* the 10th day of July, in
“ the twenty-third year of our reign.

Courtenay and Courtenay.

Indorsed *By the Court.*

Label. *Jarvase Jones* to appear before *Maurice Bateman* and others, commissioners, at such times and places as the bearer hereof shall appoint, to testify on the behalf of *Geoffrey Stradling*.

Courtenay and Courtenay.

The expence of this writ is five shillings if one or two witnesses names be inserted, and six pence for the additional label, if three; no *Subpœna* can contain more than three witnesses names. Husband and wife are accounted as two distinct persons, and inserted as such in the writ: at a private seal the expences of this process is four shillings extraordinary, and if the seal be opened, 2 *l.* 10 *s.* 6 *d.* exclusive of the ordinary expence.

The *Subpœna* to testify being thus procured, is to be served upon the witness *personally*, by delivering to him the body of the writ under seal where there is only one, reserving the label, and delivering at the same time the commissioner's summons, tendering at the time of service one shilling for conduct-money; or if the witness be at any distance from the place of executing the commission, his *reasonable* expences must be paid or tendered. If there be two or three witnesses in the *Subpœna* the two first must be *personally* served with labels severally, shewing the process itself under seal at the time of service, and a summons as before mentioned must be served upon them severally and respectively at the same time. The process itself must be left with the witness last served, the party serving the process taking a copy of the label, in order to enable him to make an affidavit of service with safety. If a witness thus served with summons and *Subpœna* to testify, neglects or refuses to appear, or appearing refuses to give evidence before the commissioners, or to assign a sufficient reason for withholding his testimony, a certificate of such witness's neglect or refusal, must be procured in writing from the acting commissioners, and an affidavit made and filed of the service of the *Subpœna* to testify, and the commissioners summons, and the same compulsory line of process before stated, as upon a neglect or refusal to attend the commissioners summons, pursued against the witness.

The production of deeds, papers, &c. in the custody of a witness may be enforced at the examination of a witness either at the Examiner's office, or at the execution of a commission to examine witnesses, by adding to the ordinary writ of *Subpœna to testify* a clause of requisition for that purpose, which is thence denominated a *Subpœna duces tecum*. This writ is obtained by leaving a *Præcipe* at the *Subpœna*-office in the following form,

Sub-

Subpœna Richard Tristram to appear before Maurice Bateman and others commissioners at such times and places as the bearer hereof shall appoint to testify on the behalf of Geoffrey Stradling and bring with him and produce (an indenture of settlement bearing date the 15th day of June 1760, and made or mentioned to be made between Arthur Radcliffe of *Essex*. Margaret Charlton of *Essex*. Sir Charles Farnaby of *Essex*. John Radcliffe and Jarvas Jones of *Essex*.) now in his custody.

Exley Solicitor.

Tested 9th July, 1783.

The writ of *Subpœna duces tecum* to testify is in the following form.

“ *GEORGE* the third *Essex*. To Richard Tristram
 “ Gentleman greeting. We command, and strictly injoin
 “ you that laying all other matters aside, and notwithstanding any excuse, you personally be and appear
 “ before Maurice Bateman, and others commissioners appointed in our Chancery, at such times and places as
 “ the bearer hereof shall appoint to testify the truth in a
 “ certain cause depending in our said court on the behalf of
 “ Geoffrey Stradling, and to bring with you and produce at
 “ such times and places as aforesaid (describe the deed *Essex*.
 “ thus) a certain indenture of settlement bearing date the 15th
 “ day of June 1760, and made or mentioned to be made
 “ between Arthur Radcliffe of Hitchin, in the county of
 “ Hertford, Esquire, of the first part, Margaret Charlton,
 “ of the same place widow of the second part, Sir Charles
 “ Farnaby of Sevenoaks in the county of Kent Baronet of
 “ the third part, John Radcliffe of Hitchin in the county of
 “ Hertford Esquire, and Jarvas Jones Clerk of the same
 “ place of the fourth part, now in your custody; and this you
 “ may in no wise omit, under the penalty of one hundred
 “ pounds. Witness ourself at Westminster the 9th day of
 “ July in the 23d year of our reign.”

Courtenay and Courtenay.

Indorsed *By the Court.*

Label, Richard Tristram *Gent. to appear before Maurice Bateman and others commissioners at such times and places as the bearer hereof shall appoint to testify on the behalf of Geoffrey Stradling and bring with him and produce (an indenture of settlement bearing date the 15th day of June 1760, and made, &c. as set forth in the body of the writ) now in his custody.*

Courtenay and Courtenay.

The expence of this writ is the same as the foregoing writ of *Subpœna* to testify before commissioners, but if the description of the deed or other document to be produced occasions the writ to run an extraordinary length, a charge is made in proportion.

The commissioners should in their summons to the witness, briefly describe the deed or instrument to be produced, and the summons and *Subpœna duces tecum* should be served in like manner as a *Subpœna* to testify.

The commissioners and witnesses having met at the time and place appointed by the notice for the execution of the commission; the commission which till that time must remain sealed, may be opened and read by the commissioners, to see their authority. One commissioner attending on each side is sufficient, but to obviate any inconvenience which may arise in case no commissioner attends on behalf of the adverse party, the party proceeding under and having the carriage of the commission, must procure the attendance of his own or any other two commissioners; for no less than two in number, can proceed upon, and return the commission.

If two of the plaintiff's commissioners attend at the time and place appointed for the execution of the commission, they may proceed therein *ex parte* (if the defendant's commissioners do not attend.) But if the defendant's commissioners attend, at the time and place appointed, and the plaintiff's commissioners are not there, they cannot go on, because the plaintiff having the carriage of the commission,

mission, will not produce it, if he is disappointed of his commissioners, and consequently there can be no proceedings for want of the commission. This makes a duplicate of the commission very necessary, for in that case, if the defendant's two commissioners meet, they may proceed in the execution of the commission; but where there is no duplicate, and the defendant's commissioners attend at the time and place appointed, and none appear for the plaintiff, the party aggrieved is to be recompensed in costs, upon complaint thereof to the court, and in such case, the court will give him leave to sue out another commission, and order him the carriage thereof.

The commission being opened and read, both parties are obliged to exhibit interrogatories (if they intend to examine any witnesses) and consequently if the plaintiff exhibits his interrogatories, and the defendant neglects so to do, and yet by his commissioners attends the execution of the commission, whereby they have an opportunity of hearing and seeing any thing that is proved on the behalf of the plaintiff: having exhibited no interrogatories the defendant will sometimes move for a new commission upon suggestion that he had no opportunity of examining his witnesses at the last commission: If it shall appear to the court by affidavit, or certificate of the plaintiff's commissioners that the defendant's commissioners attended during the whole time of the execution of the commission, and did not exhibit interrogatories; in such case the court will very rarely, and never without some inquiry, grant the defendant another commission, unless such *laches* be accounted for to the satisfaction of the court, for such a practice appears *prima facie* to be done with a view by some indirect method to come at the knowledge of the substance of what the plaintiff has proved, and then at another commission to exhibit interrogatories adapted to such questions and points, as may tend to overthrow all that has been done. And a party shall never be admitted to have this unfair advantage, for if he was, he might easily conceive what interrogatories to exhibit, and how

to hit the bird in the eye; and therefore it is incumbent, on him at least to exhibit interrogatories at the execution of the commission, if he means to ask for a new commission; and in truth his commissioners ought to withdraw, but however, if interrogatories are exhibited, it is in the distinction of the court to grant or deny another commission as the circumstances of the case upon affidavits, or the certificates of the commissioners appear. If a new commission be granted, neither parties should add to, or alter their interrogatories exhibited at the former commission; for where a party hath had a commissioner present upon the first examination, he must not examine upon new interrogatories by another commission as to the merits of the cause*.

The commissioners first administer the oath to each other, and afterwards to the several Clerks † who are employed in taking, transcribing, writing, or engrossing the depositions of the witnesses to be examined. The forms of these oaths ‡ are printed on parchment, and always annexed in schedules to the commission.

The

* *Ch. Ca.* 274.

† Depositions were suppressed because the Solicitor's Clerk wrote as Clerk in the execution of the commission to examine witnesses. 2 *Ch. Rep.* 393.—The Clerks are now sworn to secrecy, and therefore any objection of this kind would not be regarded.

‡ *Where any commission issues for the examination of witnesses, all and every the commissioners named in such commission shall, before they act in, or be present, at the swearing, or examining any witness or witnesses upon interrogatories, in such cause severally take the oath; a form whereof is annexed to such commission. And all and every the Clerk and Clerks, &c. attending the execution of such commission, and employed in taking, transcribing, or engrossing the deposition or depositions of witnesses examined on such commission, shall, before he or they be permitted to act as Clerk or Clerks as aforesaid, or be present at the execution of the said commission*

The oaths being administered to the commissioners, and their Clerks, the interrogatories for each party respectively examining witnesses, are to be produced; * to the foot of each schedule of interrogatories respectively, the commissioners attending the execution of the commission subscribe their names. The title of the depositions preparatory to the examination of the witnesses is written upon paper thus,

Depositions of witnesses produced, sworn and examined on Monday the fifteenth day of July in the twenty-third year of king George the third, and in the year of our Lord 1783, at the house of John Hart, called or known by the name of the Yatcht in Foregate street in the city of Chester, by virtue of a commission issuing out of his Majesty's High Court of Chancery to us John Radcliffe and Charles Farnaby, and others directed for the examination of witnesses in a cause there depending between Geoffrey Stradling complainant

mission take the oath annexed in a schedule to such commission. And it is further ordered, that in all commissions for examining witnesses, which shall issue after Hilary term 1721, a clause shall be inserted, injoining the commissioners before they act in, or be present at the examining any witness, they severally take the oath first specified in the schedule thereto annexed. And that all and every the Clerk and Clerks employed in taking, writing, transcribing or ingrossing the deposition or depositions, of witnesses to be examined by virtue of such commission, shall, before he or they be permitted to act as Clerk or Clerks, or be present at such examination they severally take the oath last specified in the schedule annexed. And that the commissioners, or any one of them, shall have full power and authority jointly and severally, to administer such oaths to the others of them, and also to the Clerk and Clerks upon the holy Evangelists. Per Lord Maclesfield, and Sir Joseph Jekyl, Ord. Canc. 109.

* Where a commission is taken out for the examination of witnesses, no new interrogatories, or set of interrogatories can be exhibited without motion and order of court. Preced. in Ch. 386.

and

Examination of Witnesses.

and William Stiles defendant. We the acting commissioners under the said commission; and also the respective Clerks by us employed in taking, writing, transcribing and ingrossing the said depositions, having first duly taken the oaths annexed to the said commission according to the tenor and effect thereof, and as thereby directed, on the part and behalf of the complainant, Geoffrey Stiles.

The commissioners then call a witness before them; all other persons being ordered to withdraw during the examination; so that the commissioners, their clerks, and the witness to be examined, may be left together in one room. One of the commissioners producing the interrogatories takes them in his hand, and reads the title of them to the witness to be examined, administering to the witness the form of oath as follows,

You shall true answer make to all such questions as shall be asked of you on these interrogatories without favour or affection to either party, and therein you shall speak the truth, the whole truth, and nothing but the truth.

So help you God.

This form of oath may be varied as the case may require, and the substance turned into an affirmation for a witness, a professed quaker.

When a witness is produced, he must be first examined upon the interrogatories of the producer; and then, forthwith, without suffering him to go abroad, upon the cross interrogatories of the other side*. And each party joining in, and attending the execution of the commission, ought to exhibit interrogatories: the court dislikes the practice

* If a witness refuse to be cross-examined, it is a cause of exception to his testimony, and the court, on motion, will suppress his deposition, ex parte, for it argues favour and partiality. Cl. Tut.

of examining the defendant's witnesses upon the plaintiff's interrogatories *et sic e contra**.

The witness being sworn, his name, description, addition, and age are written under the title of the depositions, and the answer given by him to each interrogatory respectively is likewise reduced into writing thus,

The Right honourable Richard Lord Grosvenor of Eaton in the County of Chester aged 60 years or thereabouts, a witness produced, sworn and examined on the part and behalf of the complainant William Stradling deposes, and saith as follows,

1st. To the 1st Interrogatory this deponent saith, that &c.

Lastly. To the last Interrogatory this deponent saith, that &c.

The mode of examination prescribed by the rules and orders of court † for the examination of witnesses at the Examiner's-office, should be observed by the commissioners at the execution of a commission to examine witnesses. The commissioners, although named by the parties reciprocally, ought to stand indifferent, and do their uttermost endeavour to find out, by due examination, the whole truth, and to suppress no part thereof; for their authority is to that end, merely and wholly from the king, by virtue of his commission: For every commissioner is made and constituted by the king, (who is the fountain of justice,) by his commission under the Great Seal, and therefore, he being commissioner upon record, is presumed to be indifferent, and although the commissioners be not equal in state or degree, yet they are all of equal power and authority; for it hath been said of old, that *there might be priority, but not superiority amongst commissioners.* The com-

* Cl. Tut. 15.

† Ant. 324.

missioners

commissioners are not strictly bound by the letter of the interrogatories, but ought to explain every other matter or thing which ariseth necessarily thereupon, for manifestation of the whole truth, concerning the matter in question. They are sworn not to discover to either of the parties, or to any others, any of the depositions, or any part of them, which they have taken, before publication pass in the cause; nor after the examination is begun, ought the commissioners to confer with either party touching the examination, or take new instructions concerning the same: and if they shall so do, it is a great misdemeanor, and punishable by fine and imprisonment*.

The commissioners must themselves examine the witnesses, and not leave so weighty an affair to their Clerks or others; they should also examine but to one interrogatory at a time, and should not read another interrogatory until the former be fully answered, and they are to hold the witness to answer every point interrogated. The commissioners are likewise to take what comes from the witnesses, in answer to what they are interrogated unto, or examined upon, and are not to permit them, upon their own sight, or reading of the interrogatories to set it down themselves, or to depart after they have heard an interrogatory read, until they have perfected their examination thereto. But after the witnesses have been examined, the commissioners may suffer them, upon better thoughts, to amend their examination. The commissioners ought not to ask any idle questions, foreign to, or *dehors* the matters to be examined unto, nor set down any impertinent or scandalous answers†; but all material

* 4 Inst. 278. 9 Rep. 70. Cro. Jac. 65. Yelv. 62.

† A witness examined at a commission, swears reflecting words, yet be ought not to pay costs, it being the commissioners fault, to take down any deposition that was scandalous or impertinent. 2 Wms. 406. Sed quære, if the interrogatories had led to it? Ibid. in notis.

answers truly as delivered. A witness may be permitted to use short notes he brings with him to help his memory, but not the substance of his depositions; nor may he transcribe such notes *verbatim*. The deposition of each witness respectively should be carefully read over to him, or he should be permitted to peruse and consider what he has deposed, that so they may have the sense of the witness *ex re nata*, without being tampered with; and upon such revision, if any errors appear, or the witness upon recollection, object to the statement, or penning of the deposition, the same must be rectified; and herein the commissioners should be very attentive*.

The witnesses must severally subscribe their Christian and surnames, or marks, to the paper draughts of their respective depositions†, after which the whole are ingrossed by the Clerks attending, and sworn under the commission upon skins of parchment stampd with an half crown stamp, each witness subscribing his name to his own deposition thus ingrossed. The acting commissioners also subscribe their names to each schedule or skin of parchment respectively. *Bac. Ord.* 68.

Sometimes books, deeds, or papers are produced at the execution of a commission in order to be proved pursuant to notice, or the compulsory process of *Subpoena duces tecum ad testific.* And after such deed, &c. is proved, it may be, and usually is made an exhibit in the cause; and for that purpose the following indorsement (without which it cannot be read in court) containing the title of the cause, &c. is written upon the exhibit produced; two or all of the acting commissioners before whom the same was proved, subscribing their names to the indorsement, thus,

* 1 *Px. Alm.* 23. *Com. Sol.* 31. *Prac. Reg.* 90, 91.

† Where a witness dies after examination, but before such examination be signed by him, the depositions cannot be made use of.

1 *Wm.* 414. 4 *Mod.* 278.

In Chancery

William Stradling *plaintiff**Between**and*Geoffrey Stiles *defendant.*

16th July 1783. *At the execution of a commission for the examination of witnesses in this cause. This paper writing was produced and shewn to Percival Stockdale Clerk, a witness sworn and examined, and by him deposed unto at the time of his examination on the complainant's behalf*. And was also produced and shewn unto, &c. a witness, &c. before us,*

John Radcliffe.

Charles Farnaby.

The depositions ingrossed as before mentioned upon parchment, must be carefully examined, and compared with the paper draughts; and when the ingrossment is upon examination, found to be a true copy of the original depositions, two (generally all) of the acting commissioners, subscribe their names to each skin of parchment. If more than one, the interrogatories and depositions thus ingrossed upon parchment and signed by the acting commissioners as before mentioned are to be annexed to the commission with the schedule of oaths, and a return is then indorsed upon the commission near the middle thus,

The execution of this commission appears in a certain schedule (or schedules if more than one) hereunto annexed.

John Radcliffe.

Charles Farnaby.

This return is made by two or more (generally all) of the acting commissioners who severally subscribe their names thereto in the manner, and form above specified.

The commission together with the oaths, interro-

* *This addition is necessary if two witnesses prove the exhibit.*
gatories,

gatories, and depositions annexed, must be so infolded that no part of the ingrossment or writing may be read, and being neatly and carefully folded and bound up together with red tape or string, in such manner that the label only of the commission may appear to view, and hang out therefrom, the acting commissioners set their seals in the several meetings or crossings of the tape or string, and upon some place on the outside of the commission, they subscribe their names. The commission thus executed, and made up, the paper draughts of the depositions of the respective witnesses for each party should be sealed up carefully, and delivered to some of the acting commissioners for safe custody. These paper draughts are sometimes divided into two parts, and the parts so divided, interchangeably kept by the commissioners for respective parties: or, which is more usual, the plaintiff's and defendant's commissioners, alternately, keep the draughts of the adverse party's witnesses; and take care that no person see them, until publication pass in the cause, consistent with their oath and the orders and rules of court.

The commission thus made up with the label hanging therefrom, must be delivered by one of the commissioners personally into the hands of the Clerk in court, making out the commission, or his agent at his seat in the Six-clerk's office; or it may be delivered by one of the acting commissioners into the custody of a careful person, with directions to carry and deliver the same into the hands of the Clerk in court *personally*, or of his agent at his seat in the Six-clerk's office, cautioning the person carrying the same to keep it very carefully and unopened; and it would be also proper to apprise such person of the oath which will be required of him, upon delivery of the commission. The Clerk in court making out the commission, and to whom it is directed to be delivered; as soon as the commission arrives, and previous to its being received by him, takes the bearer (not being a commissioner in the commission) to the sitting Master at the publick office,
or

or any other Master in his absence, before whom the bearer must make oath, "*That he received the commission from the hands of one or more of the commissioners therein named, and that it has not been opened or altered since he so received it.*" An indorsement thereof is then made upon the commission thus,

8 Nov. 1783, upon the oath of Timothy Potton
before E. Montague.

The Clerk in court, or his agent from his seat in the Six-clerk's office, takes the commission from the publick office and brings it to his seat in the Six-clerk's office and keeps it unopened until publication pass in the cause. If a commissioner, brings the commission, no oath is required of him, and the indorsement upon the commission then is,

8 Nov. 1783, Received by the hands of John Radcliffe
Esquire one of the commissioners.

Five shillings is always allowed to the person bringing the commission, or if the distance be considerable, a charge is made accordingly, and the full and reasonable expence actually paid, is always allowed in taxing costs.

The plaintiff having regularly the carriage of the commission, is to appoint the time and place of executing it, but if the defendant supposes, that the plaintiff will make delay, in such appointment, he may move for an order for a duplicate of the commission. Cases have been where the Master has appointed the time and place of executing it; however, if the officer appoints the time and place, yet the commissioners may agree to adjourn; because the appointment of the Master is only for opening the commission, and therefore, if the commissioners agree, they have notwithstanding such appointment, authority to make proper adjournments*. The fair examination by

* 2 Ch. Ca. 282. Prac. Reg. 91.

commissioners is not to adjourn without necessity because that would be to harass the defendant by obliging him to travel from place to place to cross-examine. The examination should be done, as far as it is possible, *uno Actu*; that there be as little opportunity as possible to divulge the depositions.

Where an adjournment is made, if any witnesses be examined, the time when, and the place where, such examination was taken, ought to be described, and mentioned in the title of the respective depositions, and a memorandum or entry of such adjournment made thereon, which the acting commissioners should sign; because upon an indictment for perjury committed in deposing falsely before commissioners, it seems essential to state the time and place; for *prima facie* it must be intended where the title of the depositions imports.

If the plaintiff or his commissioners abuse the carriage of the commission by making unnecessary adjournments, or an irregular examination of witnesses, that may intitle the defendant to a commission of his own, and the carriage of it.

When due notice is given of executing a commission, and, at the day appointed, the commission is opened, and nothing done thereon, and no adjournment made, the commission is lost; except the other side agree to adjourn, or take fresh notice: but if the commission be not opened, and he who has the carriage thereof give fresh notice, and then executes it; this is a sufficient execution, unless in the mean while, the adverse party has obtained and served an order to stay proceedings, until the costs of the former day's default be paid, and that they are not paid*. The reason of this rule seems to be, that the not adjourning is a refusal of the commissioners to act any further upon it:

* *Prac. Reg.* 87.

for though the court itself never adjourns, because it is always open, yet the delegated power must adjourn, for that has no standing and constant power, as the seal has; but their power arises from the words of the commission, which are, *quod mandamus, quod ad certos dies et locos, quos ad hos provideritis, testes predictos coram vobis venire faciatis et advocatis**. So that if they do not provide time and place by an adjournment, they have no authority to act further by that commission, for the delegated authority must pursue the words of the commission, or otherwise it will be construed a refusal to act. If they do not open the commission, their not acting at that time, will not be construed as a refusal to act; however, it will be considered as harassing the defendant, for which he may apply to the court, and obtain redress: and their not acting before the commission is opened, is not construed to be a refusal, because they do not know, what their authority is, until the commission is opened.

Where only one commissioner on a side meets, and the plaintiff's commissioner having the carriage of the commission, refuses to act; the court will on motion supported by affidavit of the facts, order the plaintiff to pay full costs, to be taxed by a Master, if the parties differ, and renew the commission at the plaintiff's expence†, or at least grant the defendant a new commission, and give him the carriage of it. So when a commission is lost, through the default of him who has the carriage of it ‡; or if due notice be given, and one side proceeds and examines witnesses, and the other side does not, but prays a new commission, if it be granted he shall bear all the charges of such renewed commission, both in court, and in the country, as well for the charge and entertainment of the other's commissioners as of his own, and the other side shall be

* 1 *Px. Alm.* 83.

† *Ord. Canc.* 108.

‡ 3 *Px. Alm.* 62.

permitted to cross-examine the witnesses produced by him that renews the commission. But if the other side will examine any other witness of his own, then he shall bear his own part of the charge, because he has equal benefit by the examination of his own witnesses; the charges abovementioned to be ascertained by the oath of the party, before the Master, or of him who disbursed the money for him. But he at whose instance a commission to examine witnesses after a former commission executed, and returned, is once renewed, and he by whose default, or by default of his commissioners, a former commission was not executed, and therefore is renewed, must at his peril examine all his witnesses upon such commission, or in court, by the end of the term wherein that renewed commission is returnable, because he cannot be indulged in a further probatory term*.

If the commissioners on both sides attend the execution of the commission, and the one side examines, and the other side neither examines nor puts in interrogatories, he shall never afterwards examine, unless upon special order made upon good cause shewn†. So when the defendant joins in commission, and his commissioners do not attend, or if due notice be given, and one side proceeds and examines his witnesses, the other side, if he does not examine, shall not have a new commission. But if affidavit be made of some reasonable cause of non-attendance, and that neither the party (who did not examine,) nor any for him, or by his direction, or knowledge, privity or consent have seen, read, heard or been informed of the contents of the depositions taken, or any part of them, nor willingly will see, hear &c. till he has examined, or until publication pass, the court will grant him leave to examine. So upon an examination in court before the Examiner, the court

* *Px. Alm.* 17 *Ord. Canc.* 108. *Prac. Reg.* 88.

† *Com. Sch.* 30. 1 *Ch. Ca.* 274.

upon a like affidavit will enlarge publication, or if publication be actually passed upon the like affidavit, will give the party an opportunity of examining *.

If a commissioner be examined as a witness, at the execution of a commission to examine witnesses, he must be examined by the other commissioners, as well previous to his acting as a commissioner, as also before any other witness be examined. After his examination he may join and proceed in the execution of the commission with the other commissioners; for if other witnesses be examined previous to the examination of a commissioner, and in the presence of that commissioner, the examination under such circumstances would be irregular, the commissioner having heard the former examination. The deposition of a commissioner who had so acted, and was afterwards examined in court, was suppressed upon motion †. So if a clerk, who writes for the commissioners, be examined as a witness, his examination must precede the examination of any other witness, except a commissioner under the same commission. ‡.

If a plaintiff wants to examine a defendant as a witness, he must obtain an order by motion or petition in the usual manner for that purpose; this order is of course, and must be served on the adverse party's clerk in court, by leaving a true copy of such order with the clerk in court *personally*, or with his agent at his seat in the Six-clerks office, shewing at the time of service the original order passed and entered. A defendant may obtain a like order to examine a co-defendant as a witness; but all these orders proceed upon a suggestion, that the defendant is not concerned in point of interest in the matters in question; and they are never granted without a clause of saving just exception to the other side. If any exception to the evidence of the de-

* *Prac. Reg.* 88. *For. Rom.* 130.

† 2 *Cha. Ca.* 70. *It seems as if the commissioners cannot compel a fellow-commissioner under the same commission to be examined as a witness.* 2 *Roll. Rep.* 90.

‡ 1 *Vern.* 369. *Gillb. Ch.* 139.

defendant as a witness, it must be made at the hearing of the cause.

This order for examining a defendant as a witness, must be produced at the execution of the commission, or at the Examiner's office, or wherever the examination is to be taken, when the defendant attends to be examined, without which he cannot be examined. For it is by virtue of that order, and the authority given to them by the court, the commissioners or examiners are empowered to examine a defendant, without the actual production of the original order regularly passed and entered, they must not presume to examine a defendant.

Upon a motion for leave to examine after publication, upon making the usual oath of not having seen the depositions, the *Lord Keeper* declared, that, in such case, the other side should be at liberty to examine at large, as well as cross-examine the witnesses produced by the party that made the motion (which was all he might do formerly,) and his reason was, that a crafty solicitor may lie on the lurch, and examine nothing till after publication is past; and the other party may think himself secure, and so not examine to those points, which he could otherwise have proved, in regard he finds his adversary has not examined to those matters. And when once publication is past, and the party that examined has seen his own depositions, then the side that lay still, having tied up his adversary, so that he can only cross-examine the others witnesses, applies for an order upon the usual affidavit to enlarge publication; and when he has got that order, then he comes in with a cloud of witnesses. And although it may be thought hard that any one should have liberty to examine after he has seen the depositions, yet his Lordship thought it a reasonable penalty on such as would not examine in time, or that should lie on the catch, to take advantage of the other party, and ordered the registers to take notice of it as a fixt rule for the future. *Michaemas 1684. 1 Vern. 253.*

No commission to examine witnesses can be executed in term time, *without leave of the court*, and to obviate all inconveniencies which may eventually arise in the execution of a commission, it seems adviseable in all cases, to ingraft upon the application for a commission to examine witnesses in *England or Wales*, "Leave to examine in term time."

If a commission becomes void by error of the clerk in making it, the costs shall be borne by him, and that side for whom it was taken out, or who had the carriage of it*.

If any of the commissioners obstruct the others in their examination, or examine irregularly, such misbehaviour, or what else is necessary to inform the court of, must be certified by the commissioners in the return of the commission without affidavit, because, being officers of the court, they are allowed to certify; but it seems as if the party wishing to avail himself of such certificate, must make an application, supported by affidavit, of the fact; otherwise the court will not take notice of the commissioners certificate alone, because they are appointed for another purpose, and are not to certify, but of necessity †.

Where there is a disagreement of the commissioners in the execution of the commission, or where there is any other special cause that obstructs the execution of it; the court will sometimes send down an Examiner into the country ‡.

A commissioner certifying falsely that a witness was examined upon oath, and sworn, who never was examined, is a great fault, and fineable ||.

The acting commissioners are always allowed *one guinea per diem* during the execution of the commission, exclusive

* *Cem. Sol.* 30. † *Gilb. Ch.* 138. *Prac. Reg.* 92. *Px.*
Alm. 23. *Ca.* 43. ‡ *Cem. Att.* 433. *Joth.* 39. || *Cro.*
Eliz. 623.

of every other expence incident thereto*; the clerks are in like manner intitled to *half a guinea per diem*. The expences and charges of entertainment, and other matters, are borne by the parties joining in and attending the execution of the commission. The expences of the witnesses are always to be paid by the party producing them †, before they give evidence, if required.

The expences of a commission to examine witnesses will be very disproportionate, when one party examines *twenty* or *thirty* witnesses, and the other party only *half a dozen*, the expence of keeping open the commission for the examination of so many witnesses, becomes then very expensive, and were those expences to be borne equally, great hardship would be done to one of the parties. However, any difficulty of this nature may be obviated, by each party *at the commencement*, and during the execution of the commission, keeping his respective commissioners, clerks, and witnesses, separate and apart from the others, and paying for their entertainment and charges only; and thus severing the general expence of the commission, the enormous expence and extravagance of keeping open the commission wantonly, or of examining immaterial witnesses, and by such finister practices, protracting the execution of the commission, at a very heavy, and, perhaps, ruinous expence, will be thrown upon the party who so misbehaves; and this method seems adviseable in all cases where any suspicions are entertained of such conduct. A witness cross-examined at the execution of a commission thus conducted, may be either at the joint expence of the parties examining him originally and cross-examining. But if a party insists upon cross-examining

* A *quantum meruit* lies for serving as a commissioner upon a commission to examine witnesses, though it was objected, he acted by the command of the court, *sed non allocatur*, because he is appointed at the nomination of the party who ought to pay him, if he employs him. 1 Salk. 330. Carth. 208. Comb. 186.

† Gilb. Ch. 128.

a witness (which he may do,) and needlessly defers the cross-examination, and detains the witness for several days for that purpose, the party examining such witness originally may pay the witness his expences and charges up to the conclusion of his examination originally. The expences of his detention for cross-examination incurred afterwards, must be paid by the party detaining him for cross-examination.

If a commissioner refuse to sit, the suitor has no remedy by action against him, and though perhaps his refusal will be a contempt to the court, if without excuse, yet doubtless they will not punish the person for it, unless his reasonable expences be allowed*.

All persons who are good evidences at law, are so in equity.

The party himself, or his wife, his counsel, attorney, or solicitor, shall not be examined, unless upon special cause. †

Though an attorney or counsel may demur to being examined, yet he may consent, and the court will hear his deposition‡.

Where a party examines his own attorney or clerk in court, the other side may cross-examine him relative to the same matter, but not as to any other points §.

A clerk in court, or solicitor, may be examined touching transactions antecedent to the commencement of the suit, and the knowledge whereof could not come to him as such. *Ibid.*

No person is privileged from being examined, except of the profession; as counsel, attorney, or solicitors, not an agent; for he may be only a steward or servant. *Ibid.*

A clerk in court may be examined to prove a deed; for a conveyancer may be examined. *Ibid.*

* *Shew.* 343. † *Prac. Reg.* 360, 361. ‡ 1 *Ver.* 61.
 § 2 *Aik.* 524.

A demurrer by a witness, for that he knows nothing, but what comes to his knowledge as clerk in court, or agent for defendant, in relation to the matters in question in the cause, is not good; for it ought to conclude, that he knew nothing but by the information of his client. *Ibid.*

A plaintiff cannot be a witness for another plaintiff, though he be but a trustee; but the bill should first be dismissed as to him*. And if an order be obtained by surprise for any such, it will be disallowed †. If a defendant has no interest, or disclaims, or is only a trustee, by order, he may be examined as a witness at the hearing, saving just exceptions ‡.

If a witness demurs to an interrogatory, because he has an interest, he ought to swear what interest ||.

The owner of lands in a parish, in the hands of a tenant, may be a witness in a suit for tithes in that parish §.

The inhabitant of a parish where a *modus* is insisted on, is, *prima facie*, a bad witness, if he occupies no titheable land, he must shew it **.

A commission to examine witnesses abroad

With respect to the execution, requires all, or most of the formalities observed in the execution of a commission to examine witnesses in *England*, the line of conduct in the preceding pages of this work laid down for the examination of witnesses, within the jurisdiction of the court, is sufficiently descriptive of the general mode of examining witnesses. To avoid repetition, it will be enough, therefore, to observe generally, that the same proceedings are to be had for the examination of witnesses by commission, out of the jurisdiction of the court, as are usually pursued in the execution of the general inland commissions to examine witnesses, with an exception only of a few particulars, which the distance of place unavoidably occasions.

* 1 *Fern.* 230.

† 2 *Cb. Ca.* 80.

‡ 2 *Cb. Ca.* 214.

§ 1 *Fern.* 230.

|| 2 *Cb. Ca.* 208.

§ *Burb.* 7.

** *Eun.* 40.

The residence of an adverse party in *England*, creates an absolute impossibility of giving him such notice of the time and place of execution of a commission to examine witnesses in parts beyond the seas, or out of the jurisdiction of the court, as would be *essentially* necessary to the *regular* execution of a commission for the examination of witnesses in *England*. From the impracticability of acting otherwise, arises the expediency of dispensing with that notice to a party joining in commission, which is essential to the regularity of an examination of witnesses by commission within the jurisdiction of the court; for, were notice of time and place to be given to the party in *England*, the uncertainty of transmitting the commission, with precision in point of time, by sea or land, and other incidental circumstances, which no foresight could, in long voyages, by any possibility provide for, would render the examination of witnesses beyond sea very precarious, and, in many cases, totally fruitless. Notice therefore to the party of executing commissions of this nature is dispensed with; the court from the emergency of the occasion, substituting notice to the adverse party's commissioners, or to his agent, in lieu of notice to the party himself.

The order for the commission (which in term-time should always be applied for by motion, of which notice in writing, two days previous to the application, should be given to the Clerk in court,) usually directs the adverse party's Clerk in court in a limited time to join and strike commissioners names, and to name an agent resident in the place where the commission is to be executed, to whom notice of the execution of the commission is to be given; and that service of the notice upon such agent be good service upon the adverse party, or in default of joining in commission, or naming an agent, the commission to issue *ex parte*.

Sometimes the order does not direct the adverse party to name an agent; in such case, it seems necessary that the party applying for the commission should make a subsequent application by motion or petition for an order as
of

of course, that such party may be at liberty to serve any one or two of the adverse party's commissioners with notice of the execution of the commission *. And if a provisional clause of this nature were ingrafted upon the order, where service of notice is directed upon an agent, to be named by the adverse party, it would obviate any difficulty, in case of death or absence of that agent.

It may not be a needless precaution here to observe, that if skins of parchment sufficient for ingrossing the depositions, were sent with a commission to examine witnesses abroad, they would save much trouble.

A commission being granted to examine witnesses at *Algiers*, the plaintiff died before the execution of the commission, by which the suit abated; but two witnesses were examined there before notice of the plaintiff's death, one of whom had died since his examination. *Lord Chancellor* held, that although in strictness, there was an abatement of the suit by the death of the plaintiff, and no such cause *in esse*, as *that* in which the witnesses had been examined, yet it being in a Court of Equity, and where the commissioners and witnesses had no notice of the plaintiff's death, it could not in reason or justice, affect the validity of the depositions; which were therefore allowed to stand *in toto*, as well with regard to the witness then living, as to the witness that was dead. *Thompson's Case*. 3 *Wms.* 195.

Before we conclude this general head of examination of witnesses, it will be proper to consider, as far as may be consistent with the scheme of this work, the incidents which may eventually attend the execution of a commission for the examination of witnesses abroad. Foreign contracts between merchant and merchant, arising from the commercial intercourse of this country with distant nations, whose inhabitants profess the *Mahomedan*, *Gentoo*, or other religious tenets, and the policy of extended

commerce *ex necessitate rei*, induce a dispensation with the usual and common form of oath administered to witnesses of the Christian faith. Foreigners entertaining notions of religion contrary to the Christian faith, are frequently examined by commissioners in the most solemn manner, according to the customs of their own country, and the depositions so taken, after great argument, and serious consideration and deliberation, have been held to be valid. However, the court *ex abundanti cautela* requires, that the acting commissioners should certify in writing, in what manner witnesses not of the Christian persuasion were examined, at the execution of the commission, as in the case of *Onichcend v. Barker* *.

The commissioners certified, that among other witnesses for the plaintiff, they had examined *Ramkinsensicat* and *Ramchurneucoberage*, and several others, subjects of the Great Mogul, being persons who profess the *Gentoo* religion, and that they were solemnly sworn in the following manner, *viz.*

“ The several persons being before us, with a Bramin or Priest of the *Gentoo* religion, the oath prescribed to be taken by the witnesses was interpreted to each witness respectively; after which they did severally with their hands touch the foot of the Bramin or Priest of the *Gentoo* religion. Being also before us with another Bramin or Priest of the same religion, the oath prescribed to be taken by the witnesses was interpreted to them; after which *Neenderam Surmah* being himself a Priest, did touch the hand of the Bramin, the same being the usual and most solemn form, in which oaths are most usually administered to witnesses who profess the *Gentoo* religion, and the same manner in which oaths are usually administered to such witnesses in the courts of justice, created by letters patent of the late king at *Calcutta*.”

* 1 Atk. 21.

*In this page & what follows,
much borrowed from Gilbert's
Examination of Witnesses.
Chancery. See p. 119. of that learned
work.*

The Court of Chancery in its primæval institution participated much of the practice used in the Civil law. The Civilians had a manner of examining witnesses in *perpetuam rei memoriam*, which was two-fold, either the common examination, or in *meliori formâ*. The common examination was, where the witnesses were very old and infirm, sick, in danger of death, or were going into distant countries. In this case, it was usual to file a libel, and without staying for the *litis contestatio*, the *actor* examined his witnesses immediately, giving notice, if it were possible, to the other side, of the time and place of the examination, that he might come and cross-examine such witnesses, if he thought fit; and these depositions stood good, in case the witness died, or went abroad: but the *actor* was obliged *edere actionem* within a year, otherwise the depositions went for nothing. If the witnesses lived, or did not go abroad into distant countries, then they were to be examined *post litem contestatam* *.

The examination in *perpetuam rei memoriam* in *meliori formâ* was *ad transumenda instrumenta*; and, in this case there must have been a *litis contestatio* before the examination, because there was no need of so much celerity in proving the instruments, as there was, where the witnesses were likely to die, or were going into remote parts; in these cases the actor was not bound to proceed in any action, upon these instruments within a year. But in both cases, it seems, that *publicatio testium* was, when the judgment was begun before the ordinary judge, or which is all one, when there was a *litis contestatio*.

The Examination in *perpetuam rei memoriam* in *meliori formâ*—is adopted by the court of Chancery to perpetuate testimony to a disputable fact, the witnesses to which are

* Gail. 162. 3. 4 Vent. Anal. 251.

old * and infirm, in danger of dying, about to depart the kingdom, it is therefore very usual to file a bill to perpetuate the testimony of such witnesses, although no suit is depending: for it may be, a man's antagonist only waits for the death of some of them to begin his suit. As where a bond has been entered into, upon an usurious contract, the proof whereof lies in the evidence of a witness circumstanced as before mentioned †. So if a material fact lies in the knowledge of one witness, to which fact no other person is privy; although the witness be neither old, infirm, likely to die, or going beyond sea ‡ it should seem the testimony of such a witness, might be perpetuated by a suit instituted for that purpose. But this species of examination is most frequent when lands are devised by will away from an heir at law; the devisee in order to perpetuate the testimony of the witnesses to such will, exhibits a bill in Chancery against the heir, and sets forth the will *verbatim*, suggesting that the heir is inclined to dispute it's validity, and then, the defendant having answered, they proceed to issue as in other cases, and examine witnesses to the will, and pass publication: after which the cause is at an end, without proceeding to any decree, no relief being prayed by the bill §. This is generally what is meant by proving a will in Chancery.

The mode of examination is precisely the same, as in ordinary cases, either in Court, at the Examiner's office, or by commission where the witnesses live in the country, or beyond sea.

The Court of Chancery entertained petitions to perpetuate testimony of witnesses at an early period; the petition which afterwards assumed the ordinary appellation of bill, seems to have been framed in manner and substance

* A witness aged 70 years will be ordered, as of course, to be examined *de bene esse* upon motion or petition supported by affidavit thereof.

† 1 Atk. 450. ‡ 3 Wms. 77. Mof. 389. § 1 Px. Alm. 27.

similar

similar to the present form, with this distinction only, that anciently, the practice was in the bill to pray process of *Subpœna*, specially requiring the defendant, in fourteen days, to appear and shew cause why the plaintiff should not examine his witnesses, and afterwards publish their depositions, according to the rules and orders of the Court. And the practice was, for the defendant to appear and shew cause by way of plea or otherwise *, or in default the plaintiff proceeded to examine his witnesses, whose testimony was thereby preserved and perpetuated. For the better regulation of the examination of witnesses *in perpetuam rei memoriam*, Sir Nicholas Bacon, Lord Keeper, *M. 3 Eliz.* made the following orders, *viz.*

1. The commissioners shall examine no witnesses, but such as are aged or impotent.

2. The complainants, or party who sueth forth the commission, shall give warning or notice, by precept, from the commissioners, unto the party that should take prejudice by this examination, by the space of fourteen days at the least, of the time and place, when and where the said commissioners will sit upon this commission.

3. And the same warning being so given, the commissioners are to be satisfied by the oath of the party complainant, or some other credible person, that warning is given accordingly, before they shall proceed to the execution of the commission.

4. If the party adversant or defendant can shew before the commissioners good cause of exception, either against the witnesses produced by the complainant, or any of them, or against the commissioners themselves, or otherwise, then they shall cease and forbear any further execution of the said commission; and the commissioners shall certify and return the said causes and exceptions up with the said commission.

* *West's Symb.* 190.

5. But if the party adversant cannot shew sufficient cause as aforesaid, then the commissioners shall proceed to the examination of witnesses, and the party adversant or defendant shall have liberty to join in the examination of the same witnesses, or of any other, upon interrogatories on his behalf, if he think good.

6. And if the defendant do not appear, they are likewise to certify and return whether affidavit were made of the giving of warning by precept as aforesaid or not.

Note, the foregoing are to be observed where the commission is ex parte querentis only, and are to be ingrossed on parchment, and subscribed with the hand of the Register, and to be annexed to every of the said commissions, but not otherwise. For if the defendant join, then these articles shall not need.

7. That the commissioners names be specially assigned by the Lord Keeper or Lord Chancellor, *pro tempore*.

The *Subpcena*, in *perpetuam rei memoriam*, being disused, the above orders of Lord Bacon are obsolete.

The examination of witnesses de bene esse—in the Court of Chancery is analogous to the common examination of the Civilians. The examination of a witness before issue joined, occasioned by a contempt of the party in not answering, and thereby preventing the joining of issue; or where there is danger of losing the testimony of witnesses, in case of death, by reason of sickness, or age *, or their departure from the kingdom †, in any of these predicaments, the examination of a witness is said to be *de bene*

* A witness aged 70 years, will be ordered of course to be examined *de bene esse* upon motion or petition grounded on an affidavit of the age.

† Plaintiff shall not have leave to examine witnesses *de bene esse*, because they are going to the *East Indies*, if they are his servants, and he might keep them at home. *In Scacc. Bunb.*
320.

esse, or upon condition that if the witness die, or be not forth-coming to be examined in chief, in such case, and such case only, the deposition so taken before issue joined shall be valid. The examination of a witness *de bene esse* may be incidental to every suit in the progress of it; whereas the examination *in perpetuam rei memoriam* is the fruit of a suit instituted for that particular purpose; and herein seems to be the emphatical distinction between an examination *in perpetuam rei memoriam*, and an examination of a witness *de bene esse*: though the examination *de bene esse* may eventually be in *perpetuam rei memoriam*, if the witness so examined die before he be examined in chief.

The order to examine witnesses *de bene esse* gives liberty to examine such and such witnesses *nominatim*. This order is to be construed strictly, and authorizes the examination only of the persons named therein. The examination is taken in the same manner as the examination of a witness in chief, either at the Examiner's office, by producing the order to the Examiner; or by commission in the country, for the purpose of examining the witnesses named in the order, in exclusion to all others. All the formalities of notice, &c. used in the examination of witnesses in chief, must be complied with in the examination *de bene esse*.

The Examination of a witness vivâ voce at the hearing of a cause—

Is admitted, when deeds, writings, or other documents essential to the justice of the cause have been neglected to be proved, before publication has passed in the suit: or where the plaintiff finding sufficient matter confessed in the defendant's answer to ground a decree upon, proceeds to a hearing of the cause upon bill and answer only. The defendant's answer in such case being taken as true in every point, no examination of witnesses is requisite; the proof therefore of deeds, letters, &c.

must be by witnesses *vivâ voce*, at the hearing of the cause. The utmost latitude the court have taken in this, is to allow the proving of exhibits, *vivâ voce* at the hearing, but not to let in *other examinations*; and this is allowed only where the application is by the party who is to make use of the exhibits. There never was a case where it was allowed on the application of the contrary party*; for it should seem, that the *execution only* of deeds†, the *mere signing* of a receipt or acquittance, the *hand-writing only* of letters, &c. can be proved by witnesses, *vivâ voce*, at the hearing. A witness cannot be admitted, *vivâ voce*, to prove the hand-writing of a subscribing witness to a deed, where all the subscribing witnesses are dead‡. And in the case of a will, *vivâ voce* evidence to the execution, cannot be let in at the hearing, because the due execution may come into question, which cannot be examined to *ore tenus*, at the hearing of the cause §.

To authorise the examination of a witness, *vivâ voce*, to prove an exhibit at the hearing of a cause, an order must be previously obtained for that purpose; this order is to be procured by motion in court, or petition to the Master of the Rolls, praying leave to examine a witness or witnesses *vivâ voce*, at the hearing of the cause, to prove *the signing of an account by the defendant* (or the execution of certain deeds, &c. describing them) which is always ordered, as of course, saving all just exceptions. The counsel's brief, or the petition answered, being left at the Register-office, and the order thereon being drawn up, passed, and entered at the same office, a copy thereof, two days previous to the hearing of the cause, must be served upon the adverse Clerk in court, by leaving a true copy

* Mos. 381. Gilb. Ch. 142.

† 1 Atk. 445.

‡ But in such case the court will give leave to examine in the office, to prove the deed, notwithstanding publication has passed. *Preced. in Ch.* 64.

§ 1 Atk. 203.

The indorsement expresses the purpose for which it issues, in the following words,

By order of Court to testify vivâ voce in court for Geoffrey Stradling.

Label, Thomas Harwood to appear in Chancery, returnable 23d. January, to testify vivâ voce, in court according to an order of court for Geoffrey Stradling.

The expence of this *Subpœna* at the office is five shillings, if one or two defendants, and five shillings and sixpence for three defendants, and no more than three can be put into one *Subpœna*.

The return of this writ should be the day on which the cause is set down to be heard. The *Subpœna* to hear judgment will sufficiently ascertain that time; and this process to testify should not be applied for until the *Subpœna* to hear judgment is served, and the day for hearing exactly known. And it should seem as if this *Subpœna* should be applied for, upon the foot of an order to examine *vivâ voce*, at the hearing; or that it should be engrafted upon an application for an order to that effect.

A *Subpœna* to testify *vivâ voce* at the hearing of a cause requires the same *personal* * service as a *Subpœna*, to testify in other cases; every circumstance to be observed in serving the latter may be incidental to the former, such as a tender or payment of *sufficient* money to bear a witness's † expences, service a *reasonable* time before the day to appear and give evidence, &c. ‡. But without the order to examine *vivâ voce*, a witness attending pursuant to a *Subpœna* to testify *vivâ voce* cannot be examined; and therefore it should seem that an application to examine *vivâ voce* should accompany or precede an application for an order to testify *vivâ voce*.

* Str. 510.

† Str. 1054.

‡ Str. 1150.

The examination of witnesses to the credit of a witness already examined,

Was practised among the civilians, who, in the progress of a suit allowed three probatory terms, or dilations*. In the first probatory term, the plaintiff and defendant were to produce their first set of witnesses; in the second, they were to bring witnesses to their credit, or to invalidate their testimony; and in the last probatory term they were to restore the credit of their former witnesses†, and here the examination closed, the maxim being

“ In testem testes, et in hos, sed non datur ultra.”

The Court of Chancery in its primeval institution adopted nearly the same line of practice which the civilians had previously established. The examination of witnesses therefore in both Courts is so much alike, as scarcely to admit of a distinction; or if a distinction be taken, it may justly be termed a distinction without any essential difference.

All witnesses of whatever religion, or country, who have the use of their reason, and are not infidels, are to be received and examined, except such as are *infamous* or *interested* in the event of the suit.

Infamous persons are such as may be objected to *propter delictum*, as an attainder, judgment or conviction of treason, felony, piracy, præmunire, petty larceny, perjury, and also a judgment in attainder for giving a false verdict, or in conspiracy at the suit of the King; these are good causes of exception to a witness while they continue in force‡. So if a man has had an infamous judgment, and has stood in the pillory for an offence which is con-

* 9 Nov. c. 4. Col. 7. Tit. 2. Gail. 157.

† Peers. 210. Maranth de dilat. 305.

Theory of Evid. 2 H. H. 276.

trary to the faith, credit, and trust of mankind, as forgery was formerly, he cannot be a witness in any cause: for it has been recently determined upon solemn argument, that it is the crime that creates the infamy, and takes away a man's testimony, and not the punishment for it*.

Interested witnesses may be examined upon a *voir dire*, at a general examination of witnesses, if suspected, to be secretly concerned in the event of the cause, or their interest may be proved after publication, by examination, which last is the only method of supporting an objection to the former class, for no man is to be examined to prove his own infamy†.

At law, (and the rule of evidence is the same both in law and in equity) exceptions to witnesses seem to be reducible into two kinds, first, exceptions to the *credit* of the witness, which do not at all disable him from being sworn, but yet may blemish the credibility of his testimony. Secondly, exceptions to the *competency* of the witness, which exclude him from giving his testimony at law; but in equity do not prevent him being examined, and of these the court is to judge‡.

When publication has passed, and the depositions are copied and delivered out, if either party conceive the evidence of some of the witnesses examined for the adverse party, falls within any of the predicaments before mentioned, the plaintiff or defendant may examine touching the *credit* or *competency* of any of the witnesses examined; and if their testimony be discredited, or their incompetency sufficiently proved, the depositions of those witnesses so impeached, will not be permitted to be read in court at the hearing.

The leading step towards an inquiry of this nature is, the preparing and filing objections or articles in the Examiner's office, if the depositions impeached be taken in town, or in the Six-clerks office when the deposition is

taken by commission; and in either case the objections or articles properly ingrossed should be annexed to the depositions in the respective offices where the depositions are filed; though it should seem, if the deposition objected to, be taken by commission, and the examination of the witnesses to the credit or competency be in town, the articles should be filed, as well in the Examiner's office, as in the Six-clerks office where the depositions are filed, and so *et converso*.

These articles should state the substance of the objection to the credit or competency of the witness whose deposition is impeached. A witness may be examined as to his interest in the event of the suit upon a *voir dire*, at the time of his examination in chief, be it at the Examiner's office, or by commission, and that seems the proper stage, wherein such an inquiry should be made, if a person to be examined previous thereto is suspected to have been tampered with. However, were it neglected, the party is not remediless, he may exhibit articles or objections, and therein assign an interest arising in some shape to the witness, as a cause why his testimony should not be read: the proceedings upon those articles would be the same as to disqualify a witness in any other predicament.

The articles may be in the following form, and being ingrossed upon parchment with an half crown stamp, the Examiner or Clerk in court, with whom the articles are left to be filed, will annex them to the depositions impeached, and file them accordingly.

Articles exhibited by Geoffrey Stradling complainant in a certain cause now depending, and at issue in the High Court of Chancery, wherein the said Geoffrey Stradling is complainant, and William Stiles defendant to discredit the testimony of George Thomas, Edmund Ayliffe, and Christopher Atkinson, three witnesses examined before John Morgan Esq; one of the ex-

miners of the said court on the part and behalf of the said defendant.

- 1st. *The said Geoffrey Stradling doth charge and allege, that the said George Thomas hath since his examination in the said cause, owned and acknowledged, that he is to receive or be paid, And also that he doth expect a considerable reward, gratuity, recompence, or allowance from the said defendant, in case the said defendant recovers in the said cause, or the said cause be determined in his favour. And that the said George Thomas is to gain or lose by the event of the said cause.*
- 2d. *The said Geoffrey Stradling doth charge and allege, that the said Edmund Ayliffe, Christopher Atkinson and Japhet Crooke, are persons of bad morals, and of evil fame and character, and that they are generally reputed, and esteemed so to be. And that the said Edmund Ayliffe, Christopher Atkinson and Japhet Crooke, are persons who have no regard to the nature or consequence of an oath. And that they are persons whose testimony is not to be credited or believed.*

The title of these articles are to be varied, if the depositions are taken by commission, thus,

Articles exhibited by Geoffrey Stradling complainant, in a certain cause depending, and at issue in the High Court of Chancery, wherein the said Geoffrey Stradling is complainant, and William Stiles defendant to discredit the testimony of Christopher Atkinson and Japhet Crooke, two witnesses examined by virtue of a commission issued out of the said court, to William Warne, and others directed for the examination of witnesses in the said cause upon certain interrogatories exhibited before them for that purpose. And which said witnesses were examined in the said cause, on the part and behalf of the said defendant.

The

The articles being filed, and a certificate thereof, procured from the Examiner, or the Six-clerk, with whom they are filed; the court upon application by motion or petition of course grounded upon the certificate will give leave to the party applying to examine witnesses thereon, and a commission to examine witnesses in the country. The order being drawn up, passed, and entered at the Register's office (the Counsel's brief, or the petition answered, being previously left there for that purpose,) a copy thereof must be served upon the adverse Clerk in court, personally, or left with his agent at his seat in the Six-clerks office, shewing at the time of service the original order passed and entered. And a copy in like manner must be served upon the Examiner, if the examination to the credit be in town, for "the Examiner cannot examine any witnesses " to invalidate the testimony of any witnesses, but by " special order of the court, which is sparingly to be " granted; and upon exceptions filed with the Examiner " without fee, and notice thereof given to the adverse " party, or his Clerk in court, together with a copy of " the said exceptions, at the charge of the party so examining*."

Interrogatories adapted to the inquiry intended, must be drawn and filed as in ordinary cases, and witnesses thereon examined, either by commission, or at the Examiner's office; after which the depositions are to be published in the usual manner.

The adverse party whose interest it is to support the credit of his witnesses, may examine accordingly *toties quoties*.

Cross-examining a witness, by one side in any matter tending to the merits, makes him a good witness for the other side, although otherwise liable to an exception. 1 Vern. 254.

* Ord. Canc. 105.

Publication,

IS an act performed by the officer in whose custody the depositions of witnesses in a cause are lodged. It is a publishing or making known the contents of depositions, by making copies thereof for the parties to the suit, and thereby absolving the commissioners of the oath they have taken at the execution of the commission, or the officers at the Examiner's office, so that they may declare freely, and without restraint what they know concerning such matter.

Publication may pass by

Rule to publish,

Order, or

Consent of the Clerks in court.

By rule, where either party has given a rule to produce witnesses, which is used to give the other parties notice to examine. After that is expired the same party, if he pleases, may enter another rule to pass publication, on the expiration whereof publication will pass, unless enlarged by order, which may be obtained by motion or petition.

By order, where a rule is given to pass publication, and afterwards before the rule is expired, the same is enlarged for a certain time by order. When the time limited by the order is expired, publication passes in consequence of such order.

By consent, which may be immediately, but it must be entered as such in the House-book in the Six-clerks office.

After witnesses are examined in court, there shall be two rules only given for publication; viz. an ordinary

nary rule, and then a day to shew cause why publication should not pass. And upon the return of a commission, one rule only to be given, within which time, if the other side do not shew unto the court, good cause to the contrary, publication shall pass accordingly*.

And when both plaintiff and defendant have examined such witnesses as they think proper, and are ready to go to hearing, the Clerks in court for each party to the suit may pass publication by consent, which is done by subscribing their names respectively to a consent in writing in the House-book, in the Six-clerks office, in which the rules to be given in the cause ought regularly to be entered, and thereupon publication forthwith passes.

All rules expire that day se'enight, from the day on which they are entered. These rules must be entered in the House-book in the Six-clerks office in that division where the cause originally began, (although the Clerk in court who enters the rule should be of another division.) The rules may be entered any day in term, provided they be entered eight days before the expiration of the term, otherwise they must be entered in the ensuing term. The rules are written in the House-Book of the Six-clerks office in the following form, and a copy thereof is transcribed into the Rule-book of the Clerk in court, entering the rule. The sworn Clerk's Rule-book is taken to the Register-office to be entered; the Register marks the entry, by setting his initials against the rule in the margin of the book, for which one shilling and sixpence is paid to him. The Clerk in court entering the rules, gives a note in writing to the adverse Clerk in court, of such rule being entered†.

* Ord. Canc. 107.

† Ord. Canc. 137.

The rules are entered in the books in the following forms,

7th. Nov. 1783.

Stradling	}	<i>A day is given to the defendant (or plaintiff) to produce witnesses.</i>
v.		
Stiles.		

Radcliffe Clerk for plaintiff.

16 Nov. 1783.

Stradling	}	<i>A day is given to the defendant (or plaintiff) to shew cause why publication should not pass.</i>
v.		
Stiles.		

Barker Clerk for plaintiff.

20 Nov. 1783.

Stradling	}	<i>A day is given to the defendant (or plaintiff) for passing publication upon a joint commission returned.</i>
v.		
Stiles.		

Crofts Clerk for plaintiff.

23. Nov. 1783.

Pilgrim	}	<i>We consent that publication do forthwith pass.</i>
v.		
Smith.		

Nicholls Clerk for plaintiff.

Woodcock Clerk for defendant.

The cause being at issue by *Subpœna*, or appearance *gratis* to rejoin, either party, plaintiff or defendant may give these rules; but it seems as if a defendant should wait the term in which he appears to rejoin, before he gives the ordinary rule to produce witnesses; the other rules he may give *pari passu* with the plaintiff.

These respective rules before mentioned must be given where witnesses are examined in court, or *ex parte* by commission; it seems proper to give rules to produce witnesses, and pass publication, where no witnesses are examined on either side, to conclude the adverse party from examining*.

* *Pr. H. Ch. 16, 17. Prac. Reg. 298.*

When any of the depositions are taken by the Examiner, a copy of the rule to pass publication, or a copy of the order to enlarge it, should be served upon him, or his deputy at the Examiner's office, as well to authorise the Examiner to give out copies of the depositions, and to preclude any further examination, in case a party wants to speed his cause on to a hearing, as also to prevent the Examiner delivering out copies of the depositions when a party has any more witnesses to examine. For otherwise, the Examiner after the expiration of the rule or order, at the request of either party, must pass publication by delivering out copies of the depositions: And in strictness, the Examiner or Clerk in court, in whose custody the depositions are, would be obliged to pass publication, and deliver out copies of the depositions, upon the request of an adverse party, unless on or before the day, on which the rule, or order, to pass publication expired, an order should have been obtained, and a copy of the order passed and entered, should have been served upon the adverse Clerk in court, and also upon the Examiner. It should seem upon a refusal of the Examiner, or Clerk in court to pass publication by delivering out copies of the depositions to a party applying for them, after service of a copy of the rule or order whereby publication passes, and after the day for passing publication has expired, upon motion in court supported by an affidavit of service, of the rule or order whereby publication passes, and of a demand and refusal by the Examiner, to publish the depositions the day after publication passes, (no order further enlarging publication being served in the mean time,) the court would make an order upon the Examiner to publish and give out copies of the depositions, and very possibly, would expect from him some excuse, accounting for his conduct. And unless he should assign some reasonable cause for refusing publication, and withholding the copies of the depositions, the court might order him to pay the costs of the application, and reprimand him for his misbehaviour: notice of such motion being

being served in the usual manner upon the adverse Clerk in court, and *personally* served upon the Examiner, the day next but one, before the motion is intended to be made. So where the depositions are taken by commission, and returned into the Six-clerks office, from whence the commission issued, the order to enlarge publication being served upon the adverse Clerk in court, in whose custody the depositions are, by leaving a copy of the order with him *personally*, or with his agent, at his seat in the Six-clerks office, shewing at the time of service, the original order, passed and entered, on the expiration of the rule (of which the Clerks in court for all parties, have notice from the Clerk in court, entering the rule, and by inspection of the House-book, in the Six-clerks office,) or the order to pass, or enlarge publication, the Clerk in court, so having the custody of the commission and depositions, must at the request of any party in the suit pass publication and deliver out the depositions to the Clerk in court for the party demanding them, or in default, he may be compelled thereto, in like manner, as the Examiner, unless an order further enlarging publication, shall have been opportunely procured and served.

Publication of the depositions may be enlarged by motion in court, or petition to the Master of the Rolls. Where one party examines no witnesses, and having given the ordinary rule, to produce witnesses, upon the expiration thereof, enters a rule to pass publication; if the other party has any material witnesses to examine, he must apply for an order to enlarge publication for a month, or other reasonable and convenient time, by motion or petition, alledging that publication passes on such a day by rule*, and that no witnesses have been examined on

* It seems necessary upon all applications, to enlarge publication, to state on what day publication passes, and in what manner, whether by rule or order.

either side, or that the party applying hath several material witnesses, whom he hath not been able to get examined in time, or that the witnesses, or some of them reside in the country, and no commission has issued for their examination. In such case, the court would make an order thereon as of course, and no notice to the adverse Clerk in court of such application seems necessary; but, as the plaintiff is intitled to set down his cause, upon giving a rule to pass publication, the court will make the order provisionally, as not to hinder plaintiff from setting down his cause in the mean time. So also where the cause is not set down, a like application may be made, to enlarge publication; but if the cause be set down, and the *Subpoena* to hear judgment has not been served, it seems an affidavit of that fact is necessary, and it should seem that notice of motion is likewise required.

In most cases, the court will enlarge publication, and give a party an opportunity of examining witnesses, even though publication should have been enlarged by a precedent order, if any reasonable ground can be shewn; as where a party's witnesses reside in parts of the kingdom any distance from each other, or where the party applying, was not able to examine all his witnesses under a joint commission executed in the cause, some of whom reside at a great distance from the party, and others at a great distance from the place of executing the commission; or where witnesses refuse or neglect to attend the execution of the commission, or by any accident have not been examined at the execution of a commission; in any of these predicaments, an affidavit should be made of the facts, and that the party has several material witnesses (as he is advised) to examine, without whose testimony, he cannot safely proceed to a hearing. An application granted on the foot of this affidavit, should be made by motion or petition to the Master of the Rolls, stating that publication passes on such a day by rule or order, likewise stating the substance of the affidavit before mentioned, and the court will exercise a discretion upon the
the

the case made, and enlarge publication accordingly; and if necessary, the party should engraft upon an application of this sort, liberty to sue out a commission for the examination of witnesses, with leave to execute the same in term time. Notice in writing of this application, if made by motion, must be served upon the adverse Clerk in court *personally*, or left with his agent, at his seat in the Six-clerks office, two days previous to the day whereon the application is to be made. In all these cases, where a party applies for the indulgence of the court, a provision is always made in favour of the adverse party, such as not to hinder the party from setting down his cause in the mean time; because by the course of the court *publication and hearing are not to be of the same term unless by consent or special order**. However, though the cause be set down, and the *Subpœna* to hear judgment served, upon motion or petition, alleging that publication passes by rule on such a day, or stands enlarged by order of such a date for a fortnight or any other time, that the cause is set down, and stands 30 or 40 days off in his Lordship's or his Honour's paper of causes, and that the party applying, has still several material witnesses to examine, praying that publication may be further enlarged for a week, fortnight, or any other reasonable time, the court will judge upon the ground shewn for the application, and further enlarge publication for the time prayed, or at least for a reasonable time, so as to give the party an opportunity of examining his witnesses.

Where publication has actually passed, and no witnesses have been examined on either side, or after the depositions have been copied, and delivered out; in such a stage of the suit, the court will enlarge publication upon an affidavit by the party applying, his Clerk in court, and Solicitor joining therein, that they, nor either of them, have not seen, heard, read, or been informed of the

* Prac. Reg. 298. Cl. Infl. 12. Px. Alm. 30.

purport or contents of the depositions, nor will they, or either of them see, &c. or be informed of the contents thereof, until publication shall be further enlarged and pass by the further order of this court, in case such order can be obtained. On the ground of this affidavit, it is very usual to enlarge publication, to give the party an opportunity of examining his witnesses*, so as not to hinder plaintiff from setting down his cause in the mean time. When the depositions are returned by commission, to the Six-clerks office, and remain unopened with the Clerk in court, and publication has passed; the affidavit of the Clerk in court, should state that fact in addition to the other facts stated in the affidavit as before mentioned.

A party will sometimes set down the cause for hearing, and afterwards enlarge publication beyond the day on which the same is set down to be heard. An application must be made, in that case to adjourn the cause for a certain time, and the order thereon should be served in the usual manner, upon the adverse Clerk in court, before the day on which the cause is set down for hearing; otherwise the cause when called on, would be struck out of the paper. Of this application, notice in writing, seems necessary to apprise the adverse party therewith; and such notice must be

* Upon motion for leave to examine after publication, upon making the usual affidavit of not having seen the depositions, the Lord Keeper North declared, that in such a case, the other side should be at liberty to examine at large, as well as to cross-examine the witnesses, produced by the party that made the motion, (which was all he might do formerly.) And his reason was, that a crafty solicitor may lie in the lurch, and examine nothing till after publication is past, and the other party may think himself secure; and so not examine to those points, which he could otherwise have proved, in regard he finds his adversary has not examined to those matters. And when once publication is past, and the party that examined, has seen his own depositions, then the side that lay still having tied up his adversary so that

be served upon the Clerk in court for the opposite party, *personally*, or at his seat in the Six-clerks office, upon his agent there.

Some of these applications to enlarge publication, when made by motion, require notice in writing thereof to be served upon the adverse Clerk in court, *personally*, or by leaving a true copy of such notice, with his agent, at his seat in the Six-clerks office, the day next but one, before the application is to be made. In the vacation, the application in any case, may be by petition to the Master of the Rolls, left with his secretary in the Rolls-yard, annexing thereto an affidavit in cases where it is necessary. The petition answered, or the counsel's brief on motion, being left at the register's office, and the order thereon drawn up, (which upon filing the affidavit at the affidavit office) will be passed and delivered out; and being entered at the same office, a copy of such order must be served upon the adverse Clerk in court, *personally*, or left with his agent at his seat in the Six-clerks office, shewing at the time of service, the original order passed and entered. And where the application is by motion, an affidavit of service of the notice in writing must be made and filed, in like manner as the affidavit upon which the motion is founded, and an office-copy as well of the last mentioned affidavit, as of the affidavit of the service of the notice, must be taken from the affidavit-office, for no other copy can be read in court.

All orders to enlarge publication should be obtained and served, as well upon the adverse Clerk in court, as

he can only cross-examine the other's witnesses, applies for an order upon the usual affidavit to enlarge publication, and when he has got that order, then he comes in with a whole cloud of witnesses; and though it may be thought hard, that any one should have liberty to examine, after he has seen the depositions, yet, his Lordship thought it a reasonable penalty on such as would not examine in time, or that would lye upon the catch to take advantage of the party; and ordered the register to take notice of it as a fix'd rule for the future. 1 Vern. 253.

upon

upon the Examiner, on or before the day on which publication actually passes in the cause.

The publication of depositions taken *in perpetuam rei memoriam* in no wise differs from the mode of publication in ordinary cases. A suit to perpetuate testimony seeking no further relief, than the preserving and recording the testimony of the witnesses examined, closes with the publication of the depositions; and the defendant is intitled to move for his costs occasioned thereby, after publication, upon giving notice thereof in writing in the usual manner, to the adverse Clerk in court.

The ordinary course of the court is that depositions taken *de bene esse*, are not to be published, unless a witness dies before issue joined, and there is no opportunity to examine in chief, or is gone to a great distance, so that it is impossible to have a subsequent examination of him in chief: it is a motion of course, on a proper affidavit, to publish them. This is the usual, but not the only case, in which the court can order depositions taken *de bene esse*, to be published; the fundamental rule is, they are not to be published, but where there is a moral impossibility to have an examination in chief; as where the witnesses are dead, or beyond sea, at the time of applying, or before such time as there was an opportunity to examine in chief. The common order the court makes is, that when publication passes in the cause, the deposition of such a witness *de bene esse* be published, with this cautionary clause, "that it be without prejudice to any exception which may be made at the hearing of the cause by any of the defendants against reading the depositions against such defendants."

The order for examining *de bene esse* being only provisional, if there is any opportunity of examining in chief, it must be done: and if any *laches* be incurred in so doing, these provisional orders are forfeited, otherwise all these examinations would in effect be examinations in chief*.

* 2 Vez. 336. 496.

To effectuate the publication of a deposition taken *de bene esse* of a witness dying before he could be examined in chief; a certificate of the burial of the witness, or an extract from the parish-register book of burials (if possible) should be procured from the parish where such witness was buried: or if that cannot be obtained, an affidavit should be made of his death. The certificate of the burial of the witness, or the extract from the parish-register book of burials, should be verified by affidavit of the person making the search, and the affidavit should likewise identify the witness, the entry of whose burial is thus registered, to be the same witness examined *de bene esse*, and whose deposition is required to be published. These requisites being obtained, an application may be by motion in court, or petition to the Master of the Rolls for an order to publish the deposition of such a one, a witness examined, *de bene esse*.

The proper stage of a suit wherein this application should be made, seems to be after publication has passed in the cause, and it is then generally grounded upon the foot of an affidavit, in substance, as before mentioned, and upon an allegation that publication has passed in the cause, and that the witness whose deposition is taken, *de bene esse*, died before he could be examined in chief. Notice in writing to the adverse clerk in court is likewise necessary, if the application be by motion; and of the service of such notice an affidavit should be made and filed at the affidavit-office, previous to the motion coming on to be argued. An office-copy as well of the affidavit on which the application is grounded, as also of the affidavit of service of the notice, should be procured from the affidavit-office, to be read in court: and upon reading the affidavit of the death of the witness, and the affidavit of service, if the other side do not attend, the court will make an order as of course that the deposition of the witness taken, *de bene esse*, in the cause be forthwith published.

When

When the application is by petition to the Master of the Rolls, a similar affidavit of the certificate, or extract of the parish register-book, of the burial of the witness, as before mentioned, must be annexed to the petition, which should state, that publication has passed in the cause, and that such a one, a witness examined *de bene esse*, on behalf of the party applying, died before he could be examined in chief, as by affidavit appears, praying leave to publish the deposition so taken *de bene esse*, which upon filing the affidavit will be ordered as of course.

The counsel's brief, or the petition answered, being left at the register's office, the order made thereon will be drawn up, the affidavit, when applied for by petition, being filed previous to the delivery of the order, to be passed and entered. A copy of the order passed and entered, must be served upon the adverse Clerk in court, *personally*, or left with his agent, at his seat, in the Six-clerks office, shewing the original order passed and entered at the time of such service.

The order to publish the deposition after service, upon the adverse Clerk in court, must be left with the Clerk in court in whose custody the deposition is lodged; if the deposition was taken by commission, or with the Examiner, if the deposition was taken at the Examiner's office, the order authorizes the publication of the deposition, which will in consequence be opened, and copies delivered out to the parties applying for them. If any irregularity be discovered, or the adverse party be advised of any ground to object to the reading the deposition, he should give notice in writing to the adverse Clerk in court, and move to discharge the order immediately upon the service of it, or with the earliest opportunity: and the court will decide, upon hearing the facts alledged on each side, verified by affidavits made and filed at the affidavit-office; and should the order to publish be discharged, the depositions taken *de bene esse* will be of no avail: for it seems that although depositions taken *de bene esse*, are irregular,

yet, at the hearing of the cause, it is too late to make objections for irregularity; but in such case, a motion should have been previously made, to discharge the order for publication*.

It should seem if a witness be gone to a great distance, into parts beyond sea, upon an affidavit thereof, and that the party hath not heard from him for a certain length of time, nor doth he know whether he is living or dead, or where he is: the court would upon the foot of such an affidavit, make a similar order, as in the case of a witness examined *de bene esse*, dying before he could be examined in chief†.

The deposition of a witness examined *de bene esse*, can in no wise be published in the life time of the witness, unless at the time of applying he be in the predicament last above mentioned. Applications to this effect have been made, when many circumstances have concurred, to induce a belief, that the examination *de bene esse*, and the examination in chief were contradictory, and after solemn argument, publication has been refused. Even publication for the private inspection of the Lord Chancellor only, in the nature of an examination, *ad informandam conscientiam judicis*, where it was supposed the examination *de bene esse*, was more full than the examination in chief, has been refused, although precedents in former times authorised such a practice‖. An application to publish a deposition *de bene esse*, to be read at a trial at law, to confront the witness, and invalidate his testimony *vivâ voce*, upon a new trial, was made in this court very lately; a witness had been examined *de bene esse*, and in a trial at law, his evidence there differing materially from what he had before uniformly declared the fact to be, (to perpetuate which declarations, his deposition *de bene esse*, had been taken,) a

* 2 Atk. 190. † 2 Vez. 337.

‖ 1 Wms. 567. 723. 2 Eq. Ca. Abr. 417.

motion was made to publish the deposition taken *de bene esse*, to confront the witness at a new trial in the court below, and to invalidate his testimony. The case made in support of the motion, was a very strong one, and abundantly sufficient to justify a departure from the strict maxim of practice, if it were possible in any case to dispense with it. After much argument, upon the first blush of the case, an order to publish the depositions for the intended purpose was made; but upon serious consideration and deliberation, and before the order was delivered out, the Lord Chancellor altered his opinion, and refused the order *.

In all cases of a cross bill filed after the original cause has been proceeded in, a motion to enlarge publication should be a special motion on notice that the court may judge of it on circumstances, and not of course; as it is, where the original cause is not proceeded in; for otherwise it would be easy to delay the hearing of a cause by keeping this up. 2 *Vez.* 336. *Aylet v. Esqy.*

Where the defendant in a cross bill who is plaintiff in the original bill, is in contempt for not putting in an answer to the cross bill, it is irregular to move to stay proceedings in the original cause, until such answer comes in; but the plaintiff in the cross bill may have publication in the original cause enlarged to a fortnight after the answer to his bill is come in. The general rule of the court being, not to stay proceedings, but publication only, 1 *Atk.* 21. 291.

* *Pegge v. Burnell*, Pasch. 1781.

Depositions.

Depositions of witnesses are their answers upon oath reduced into writing, to such written interrogatories or questions as are exhibited or administered to them, either by an Examiner, at the Examiner's office, or by commissioners in the country.

The depositions taken in town by the Examiners, are to be closely kept by them in their office, and no copy or abstract is to be delivered out, until publication pass by rule or order of court. Those taken by commission, are immediately upon bringing in, to be delivered to the sworn Clerk who made out the commission, to be safely, and securely kept without opening, until publication regularly pass in the cause: if they be not thus kept, of record by the proper officer, they are void, and not to be made use of in any proceeding, in this court, or at law*.

Whereas in former times as well as lately, complaints have been made by the Examiners of this court, that after depositions of witnesses have been taken in their office between parties, plaintiff and defendant, one of the said parties, or some of their agents have taken out the copies of depositions for his party only; and afterwards the same party hath for money or other reward, given or suffered other copies to be made out of them to the adverse party, his solicitor or agent, who have made use of them on all occasions, as if authentic; by reason of which said second copies so surreptitiously made, the court may be misguided; all which doings tend to the great abuse of the court, and prejudice of the clients and their causes, as well as to the scandal of the said offices, and the depriving the officers of their due fees. And whereas orders have been made (as often as grounds for the said complaints have been offered) for the redressing thereof; but the directions

* Ord. Canc. 128. Prac, Reg. 137.

thereby given, have proved ineffectual, some of them tending rather to put the party aggrieved to a further expence than to redress the grievances complained of. And whereas the present Examiners of this court have, by their humble petition besought the Lord Keeper of the Great Seal of England for redress in the premisses, and to prevent the like inconveniencies for the future ; and his Lordship having taken their said petition into his serious consideration, and calling to mind, that the like matter thereby complained of happened lately in court in the causes of *Doughty* and *Wilcox*, and *Wilcox* and *Doughty*, and observing that the last order made in such cases, that the causes should be put off, and five pounds paid to the other side, is no redress to the court, (who is the party aggrieved, he being put to the new charge of another day's attendance, and the five pounds being never paid) for as much as the Clerks and agents, on both sides are confederates in the said practice ; wherefore for the prevention of the like scandal to the court, charge to the clients, and fraud to the said officers, for the future his Lordship doth order that no copies of depositions shall be read, or made use of, either in court or before any Master in any cause, but such as is taken out of the proper office, and signed for the party, for whom the same shall be read. And to the end this order may be more strictly pursued, his Lordship doth further order that the said Examiners shall by themselves, or by their deputy, have liberty to attend in court, at the hearing of all causes, to inspect all books of depositions which are brought into court, and read either for plaintiff or defendant, and to see whether they be duly signed for the party that doth produce the same : and in case the said Examiners, or either of them, or their deputy shall discover to the court, any such fraud or practice committed, that then, the cause or causes wherein such practice or fraud is committed, shall be put off, and the parties offending shall stand committed to the prison of the *Fleet* until the officer empowered be agreed with, and paid his due fees, and

and until they shall also have paid the sum of five pounds, into the hands of such person, as his Lordship shall direct, for the use of the poor, and until such client or clients shall be reimbursed his charges in respect thereof, and until the further order of this court. And that no person may plead ignorance herein, this order is to be set up in the several offices concerned therein belonging to the said court*.

An office copy of the depositions being made, before it is delivered out of the office, the Six-clerk or Examiner, in whose division the depositions are copied, must subscribe his name thereto; for without the signature of the proper officer the copy is not authenticated, and will not be permitted to be read in evidence.

The office copy of the depositions taken on behalf of the adverse party, being made and delivered out, to which an office copy of the interrogatories whereon such depositions were taken, is always annexed; both parties have an opportunity of perusing the interrogatories exhibited on each side. If either party be advised that the interrogatories are *leading, impertinent or scandalous*, this seems to be the proper stage of making that enquiry; the primary step towards interrogating any of these points, is to apply by motion of course, stating that the cause being at issue, the plaintiff (or defendant) exhibited interrogatories for the examination of witnesses, which the plaintiff (or defendant) is advised are leading, that the interrogatories may be referred to a Master, to look into the interrogatories, and certify whether the same be leading or not.

The counsel's brief on the motion being left at the register office, and the order of reference drawn up, passed and entered at the same office, a true copy of such order passed and entered, must be served upon the adverse Clerk in court, *personally*, or left with his agent at his seat in the Six-clerks office, shewing at the time of service,

* Ord. Canc. 3. 60. 196.

the original order passed and entered. The original order passed and entered, must be produced at the Master's office, to whom the reference is made, and a true copy thereof left with him: the Master's Clerk will thereupon give out a warrant which usually appoints an attendance, the day next but one, from the day on which the warrant is taken out. A copy of the warrant must be served upon the adverse Clerk in court, in like manner as the copy of the order before mentioned is served, the day next but one on which the attendance is appointed, unless it be Sunday. After one or two warrants regularly served, both parties attend the Master at the time and place appointed by the warrants; and the order of reference being produced, and an office copy of the interrogatories referred, the Master hears the arguments on each side (the counsel who signed the interrogatories sometimes attends) and the office copy of the interrogatories being left with the Master he generally takes some short time to consider thereof, unless the matter appear very glaring on one side or the other, and in that case he delivers his opinion in the presence of the parties attending him, and afterwards certifies his opinion to the court, that such part, or the whole of such an interrogating is leading, as asks the following question, *viz.* (setting forth the whole of the interrogatory which he certifies to be leading.)

If the adverse party do not attend the warrants, after the regular service of three warrants successively, the Master proceeds upon the reference, and certifies his opinion as before mentioned; but before this is done, the Master requires the regular service of each warrant respectively upon the adverse Clerk in court, to be ascertained upon oath *, and then the certificate or report is made *ex parte*,
and

* The service is sworn to *ore tenus*, and a memorandum in writing is indorsed upon each warrant thus, " Upon the oath of
" John

and therein he states that having been attended by the plaintiff's counsel, Clerk in court, or Solicitor, (by whom of them the attendance is) and none attending for the (adverse party) plaintiff or defendant, though duly summoned as by oath made before him appears, &c.

The Master's certificate, although in the nature of a report, requiring no application to the court for confirmation, no objections thereto can be brought into the Master's office; this however does not preclude the party from taking the opinion of the court thereon, if he be advised that the Master has certified ignorantly or irregularly. Exceptions may be taken to the Master's certificate, and proceeded upon in the ordinary mode of excepting to reports *.

The party in whose favour the certificate or report is made, takes it away, paying 15 shillings, if before hearing, and files it at the report office; for until the report is filed, no proceedings can be regularly grounded thereon †.

If the Master certify the interrogatories to be leading, and his certificate be not excepted to, all the depositions taken upon those interrogatories, will be suppressed by motion, as of course, grounded upon the foot of the Master's certificate or report, notice in writing of such motion being served in the usual manner, upon the adverse Clerk in court, *personally*, or left with his agent at his seat in the Six-clerks office, the day next but one before the motion is made: to obviate any difficulty, if the adverse party do not appear, it seems necessary to have an affidavit of service thereof made and filed, and the office copy ready to

"John Doe *before* E. Leeds, 21st, May, 1783." and the warrants are retained by the party swearing to the service, so that were a person hardy enough to swear falsely, it would be almost impossible to convict for perjury.

* Ant. Pag. 271.

† 2 Wms. 517.

read, if required. An office copy of the Master's report, is also essentially necessary, upon the reading whereof the court will make an order to suppress the depositions.

The counsel's brief upon the motion being left at the register office, and the order thereon drawn up, passed, and entered at the same office, and a copy thereof served upon the adverse Clerk in court, *personally*, or left with his agent at his seat in the Six-clerks office, shewing at the time of service, the original order passed and entered; at the hearing, if an attempt be made to read the depositions thus suppressed, upon production of the order, the attempt will be frustrated.

If the report be excepted to, as on the one hand, the court never countenances leading impertinent or scandalous interrogatories, so on the other hand, they are not over curious in these matters, because it may fall out that the interrogatories may be reported leading, &c. in the very points on which the cause turns; and when this comes to be the case, the party who refers the interrogatories hath gained his end, for perhaps he had a very bad cause, if the depositions had stood, whereas if they are suppressed, he may be able to make out a very good case, (since his adversary must hear the cause without any proof at all) unless the court is pleased to grant him another commission on payment of costs for the leading interrogatories, which is seldom or ever done after the depositions are published*; and it is hard that in equity a man should be deprived of a right through the slip of another man's pen, or the inadvertency or unskilfulness of his counsel's penning his interrogatories; and therefore if it is possible

* *Though the rule be, that after publication, no new witness can be examined, nor a witness before examined, re-examined; yet on special circumstances, set forth by motion and affidavit, the rule may be dispensed with.* 1 Ch. Ca. 25. 228. 2 Ch. Ca. 75.

for the court to help him, they will, from the manifest inconvenience which must attend such a case. Indeed if the interrogatories are reported to be leading in parts upon which the cause does not turn, and if the depositions in those points should be suppressed, and the party has evidence enough left without them, there is no harm done. But if the material points in the cause turn upon them, every opposition should be made to support the depositions, since there might have been the same answer to a fair question as to an unfair one : and it should seem if one interrogatory be reported leading, the deposition to that interrogatory only, should be suppressed ; so if part of an interrogatory be reported leading, so much of the deposition as relates to, and answers the leading part, should be suppressed * ; and the party whose depositions are thus impeached, would act wisely in attempting to prevail upon the court to make such a distinction in order to let in the evidence which is not taken upon a leading interrogatory, and which otherwise upon a general order of suppression would stand suppressed of course.

Therefore, where interrogatories and the depositions of a witness taken on them had been suppressed, for that the interrogatories were leading, and the court being moved, that a new set of interrogatories might be drawn, and settled by the Master for the examination of this witness, whose evidence was very material, and yet would be wholly lost, unless the court would indulge them this way, and though the practice was admitted to be against it, and it was urged to be of dangerous consequence, yet one precedent being produced to this purpose, and the interrogatories which had been suppressed, being such as might be drawn by many other counsel, without any apprehension of their

* Gilb. For. Rom

being leading, the court to let in the party to the benefit of his witness's testimony, ordered interrogatories to be put in, and settled by a Master for his examination over again *.

Interrogatories may in like manner be referred for scandal, or impertinence, and the depositions containing scandal or impertinence suppressed or expunged †.

On a petition to amend the deposition of a witness, the witness and the Examiner were ordered to attend, and the Examiner being examined by Lord Chancellor, swore he took the deposition only from the mouth of the witness, to whom he distinctly read it, and then the witness subscribed his name. The witness being examined did not swear positively that the Examiner had taken his deposition false, but that he was induced to believe he did not express himself in the same manner the deposition was taken, and was positive he did not intend or mean to swear, as the Examiner had taken it down, but really as the amendment observed; and that the same was what he had before declared in conversation, and also what another witness in the cause had positively sworn. Lord Chancellor *King* said, that where it appeared that either the Examiner is mistaken in the taking, or the witness in making the deposition, he thought it was for the advancement of truth and justice to amend it, and the sooner this is done the better, in regard the witness may be abroad or in remote parts before the hearing. It would be unjust to pin a witness down to what is a mistake, by denying to rectify it; and as to the amending of it after publication, the mistake could not be known before. Therefore his Lordship ordered it to be amended, and the witness to swear it over again †.

* Preced. in Ch. 493. 1 Eq. Ca. Abr. 232.

† 2 Wms. 426.

† 2 Atk. 235.

Depositions taken *de bene esse* cannot be published without an order, nor until publication passes in the cause.

The depositions of witnesses taken by commission in a distant kingdom, sometimes are omitted to be ingrossed upon parchment or paper with the usual stamp. To remedy this inconvenience after publication has passed in the cause, the depositions must be taken by the Clerk in court to the stamp-office, and a proper stamp impressed thereon, before an office copy be delivered out. And where depositions are taken in the language of the country in which the commission is executed, an application must be made by motion, or petition to the Master of the Rolls that some notary public, or other person (naming him) may be appointed to translate the depositions out of the *German, Dutch, Italian* or other language in which they are taken, into the *English* language. And that such interpreter be sworn to the true translation thereof. And also that the parties applying may be at liberty to read an office-copy of such translation at the hearing of the cause, which is usually ordered as of course upon an allegation that a commission for the examination of witnesses was executed at (*Hamburg* or any foreign city) and the same has been returned and the depositions published, and that the witnesses being foreigners, their depositions are taken in the *German, High Dutch*, or any foreign language: upon these allegations the order is made of course. The counsel's brief, or the petition, as answered, being left at the register office, and the order made thereon drawn up, passed, and entered at the same office, a copy thereof must be served upon the adverse Clerk in court, *personally*, or left with his agent at his seat in the Six-clerks office, shewing at the time of service, the original order passed and entered, this seems reasonable in case an improper person be appointed to translate the depositions. The answer being delivered to the person whom the order appoints.

points to translate the same : after the translation is made, and ingrossed upon parchment with an half crown stamp, the translator is taken with the translation to the public-office, and the order appointing him being produced, the translation is sworn to before the sitting Master there, or in his absence before any other Master of the court. The translation and the record of the depositions are to be annexed together, and left at the public-office until the clerk in court fetches them away. An office-copy is then made of the translation, and at the hearing of the cause, the order for reading the translation being produced, the office-copy of the translation will be received in evidence.

Where either the plaintiff or defendant obtains an order to use the depositions of witnesses taken in another cause, the adverse party may likewise use the same without motion, unless he be, upon special reason shewn to the court, by that party first desiring the same, inhibited by the same order so to do. *Ord. Canc. 109.*

The words of course preceding depositions, taken
in the Examiner's office.

Witnesses examined in a cause depending, and at issue in this honourable court, wherein Geoffrey Stradling is complainant, and William Stiles is defendant on the part and behalf of the said complainant, by John Spooner Esquire Examiner in Chancery.

John Radcliffe of Grosvenor Square in the county of Middlesex, Esquire, aged 46. years and upwards, being produced as a witness on the part and behalf of the complainant, in this cause, was on the eleventh day of June, in the year of our Lord 1783. shewn in person at the seat of Mr. Herbert Crofts, who is the clerk in court, for the defendant in the title of the interrogatories named by Mr. Heather one of the sworn clerks in my office, who then also left a note of the name, title and place of abode of

D d

the

Depositions.

the said deponent at the seat aforesaid, and afterwards on the same day and year, the said deponent being sworn and examined, deposeth and saith,

1st, To the first interrogatory deponent saith, &c.

**The words of course preceding depositions taken
by commission.**

Depositions of witnesses, produced, sworn and examined, on the 20th day of June, in the 23d year of the reign of king George the third; and in the year of our Lord 1783, at the house of John Hart, innholder, known by the name or sign of the Yatch, situate in the City of Chester, by virtue of a commission issuing out of his Majesty's High Court of Chancery to us, A. B. C. D. E. F. and G. H. directed for the examination of witnesses in a cause then depending between Geoffrey Stradling complainant, and William Stiles defendant. We the said A. B. and C. D. the acting commissioners under the said commission, and also the respective clerks by us employed in taking, transcribing and ingrossing the said depositions having first severally taken the oaths annexed to the said commission according to the tenor and true effect thereof, and as thereby is required.

On the part and behalf of the complainant Geoffrey Stradling.

William Egerton of Tatton in the county of Chester Esquire, aged 50 years and upwards, a witness produced, sworn, and examined on the part of the said complainant Geoffrey Stiles deposeth, and saith as follows,

2d. To the second interrogatory this defendant saith, &c.

Setting

Setting down the Cause for Hearing.

PUBLICATION being regularly passed in the cause, and the depositions delivered out to all parties applying for them; the cause is then ripe and proper to be set down for hearing, which may be done at the procurement of the plaintiff or defendant, before either the Lord Chancellor, or the Master of the Rolls, according to the discretion of the Solicitor, regulated by the nature and importance of the suit, and the arrear of causes depending before each of them respectively.

The stage in which the plaintiff may hear his cause, is the term next ensuing the term wherein publication passed; for publication and hearing cannot be of the same term, unless by consent of all parties or special order *. There are very few, if any instances, where the court has been prevailed upon to hear a cause in the same term in which publication passed; because it is against the standing course of the court. The plaintiff being intitled, after the rule to pass publication has expired, to set down his cause to be heard in the subsequent term; although a defendant may, upon application, by motion or petition of course, obtain an order to enlarge publication for a reasonable time, the court, *ex abundanti cautela*, always engrafs upon such order this restrictive clause, *so as not to hinder the plaintiff from setting down his cause in the mean time*.

If the plaintiff enlarges publication beyond the day on which the cause is set down to be heard, an order should be obtained upon motion or petition of course, to adjourn the cause, otherwise when called on, it will be struck

* Prac. Reg 185. Px. Alm. 25. Ord. Canc. 211.

out of the paper. And the service of the order to adjourn should be by leaving a true copy of such order passed and entered, with the adverse clerk in court *personally*, or with his agent at his seat in the Six-clerks office, shewing, at the time of service the original order passed and entered. In some cases, notice of such motion seems necessary, as where publication has passed, and process to hear judgment has been served: Notice in writing of this application, if made by motion, seems reasonable, to give the adverse party an opportunity of opposing it, if it be irregular or intended for delay, and the court expects such notice to be given; for if the order should be obtained upon false allegations, or without stating the situation of the cause to the court, the defendant might give notice in writing, stating the irregularity or imposition upon which the order was obtained, and the court would discharge it with costs. And it should seem that any party who sets down a cause for hearing, and is not prepared for it when called on, but desires it may stand over to another day, must pay the costs of the day, if the court see fit to indulge him with a further day *, which perhaps in all cases will not be done.

If the plaintiff do not set down his cause to be heard in the first term after publication passes, the cause may be set down in the term next ensuing at the request of the defendant †; because the plaintiff has delayed the defendant, by lapsing the time in which he was to hear his cause. And if the plaintiff do not appear upon service of the *subpœna* to hear judgement, upon affidavit of service thereof, the plaintiff's bill will be dismissed with costs; for after publication is completely passed, the bill cannot be dismissed for want of prosecution, and the defendant will be intitled to

* Prac. Reg. 186.

† In injunction causes, the defendant is at liberty to apply for setting down the cause, the term next after publication hath passed. *Ora. Canc.* 212.

have his full costs, if the bill be dismissed at the hearing *. But where the cause is set down *ad requisitionem defendantis*, if the plaintiff, although not served with a *subpœna* to hear judgment, attend by counsel when the cause is called on, and the defendant makes default, yet the plaintiff shall not have costs, for he was not compelled to appear; and it was in the option of the defendant to hear the cause or not. † So if the plaintiff sets down his cause for hearing, and does not serve defendant with a *subpœna* to hear judgment, if the defendant attends and the plaintiff makes default, the cause will be struck out of the paper, and no costs given on either side.

The Six-clerks claim a privilege of setting down a certain number of causes to be heard before the Lord Chancellor, or Master of the Rolls. They usually give notice to their sworn clerks, when they intend to set down causes for the ensuing term, which in Hilary, Trinity and Michaelmas terms is usually the day after the third seal, and in the Easter vacation, the day before the first seal preceding Trinity term. The Solicitor being prepared and willing to bring on his cause for hearing, acquaints his clerk in court therewith, who applies to the Six-clerk of his division, and leaves with him a short note in writing containing the title of the cause, and the object of the suit, also that a rule to pass publication has been regularly entered and expired, and thereupon the Six-clerk will set down the cause accordingly before the Lord Chancellor, or Master of the Rolls, as the party setting down the cause directs. If the plaintiff is inclined to hear his cause upon bill and answer only, his clerk in court applies as before mentioned, adding to the foot of the note "upon bill and answer" instead of a rule to pass publication, &c.

The Six-clerks are limited as to the number of causes they have the privilege of setting down, and if their number be complete, the cause must be set down with the

* Cl. Int. 31.

† 3 Atk. 558.

register, but previous thereto a certificate must be obtained by the clerk in court from the Six-clerk *that the pleadings are regularly filed, or that publication hath regularly passed in the cause as appears by his books.* To set a cause down upon bill and answer only, a certificate of the pleadings being filed is sufficient, if witnesses have been examined or rules to pass publication given, a certificate of the latter sort must be procured and produced to the register, before he will set down the cause.

In setting down causes, care should be taken that no irregularity be incurred, for after a decree it seems as if a reference to a Master might be obtained to enquire if the cause was set down regularly or not *.

The party at whose request a cause is set down for hearing would act wisely in all cases, to have ready, when the cause is called on, an affidavit of service of the *subpœna* to hear judgment upon the adverse party. A plaintiff neglecting such precaution cannot pray a decree *nisi*, against a defendant making default at the hearing; for it is upon reading an office-copy from the affidavit office of the affidavit of service of the *subpœna* to hear judgment, that the court makes any decree in the absence of the adverse party. On the other hand, a defendant setting down his cause, and omitting such a necessary proceeding, cannot have a bill dismissed with costs; for unless the defendant can shew to the court that the plaintiff has been regularly served with process to hear judgment, and an affidavit of such service is produced and read in court, no dismissal can be pronounced.

Where a defendant has been served with *subpœna* to hear judgment and it is suspected the plaintiff will not appear at the hearing of the cause, the defendant or his clerk in court upon whom the process to hear judgment was served, must make an affidavit that he has been served with the *subpœna* to hear judgment on such a day, and if the cause

is called on, and the plaintiff do not appear, the defendant may call upon the court to have the bill dismissed perhaps with costs; which upon hearing an office-copy of the affidavit of such service read, will be ordered accordingly.

The course of the court is, upon default of plaintiff or defendant appearing to hear judgment when the cause is called on, and an affidavit of service of process to hear judgment is wanting, to strike the cause out of the paper without costs to either party.

“ A note of all causes, pleas, demurrers, exceptions to
“ reports and the like, that are ordered to be set down for
“ hearing, shall hereafter from time to time be affixed,
“ and set up by the registers in their office, two days before
“ the same are respectively appointed to be heard. And
“ in order hereunto all clerks, solicitors and others are
“ hereby required to bring to the registers office in due
“ time, all orders for setting down of causes, pleas, de-
“ murrers, exceptions to reports, and the like, made upon
“ petitions or otherwise, that so they may be set up in
“ the register office as aforesaid, otherwise the said
“ causes, pleas, demurrers, exceptions to reports and the
“ like, shall respectively be put off from hearing for that
“ time, and shall not come on again to hearing, without
“ further order *.

The register's book of causes, &c. to be heard before the Lord Chancellor, or Master of the Rolls, is open to the inspection of solicitors at the registers office during office-hours.

* Ord. Canc. 158.

Subpoena to hear Judgment.

THE cause being set down for hearing before the Lord Chancellor, or the Master of the Rolls, awarding process to hear judgment is the next concern.

To obtain any kind of relief at the hearing, it is indispensably necessary to prove the service of the *subpœna* to hear judgment upon the adverse party.

The *subpœna* to hear judgment can be procured only upon the register's note of the cause being set down to be heard, which serves as a certificate to the *Subpœna*-office for the regular issuing of this process; and without it the *subpœna* can in no wise be obtained by a party leaving a *præcipe* simply.

The clerk in court setting down the cause, applies for the register's note thereof in writing, and that being obtained a *præcipe* for the *subpœna* is made out in the following form to which the register's note is to be annexed, and both are left at the *Subpœna*-office when the *subpœna* is bespoken *.

* Where there are more than three defendants the following seems the most convenient form of making out the *præcipe*, observing never to put more than three defendants in each *præcipe*.

Subpœna William Stradling, Samuel Pilgrim and Timotby Potton and his wife to appear in Chancery to hear judgment, &c.

Subpœna Thomas Whetbam, Arthur Whetbam and Harriet Whetbam to appear in Chancery to hear judgment, &c.

Subpœna Sir Charles Farnaby Radcliffe, Robert Hinde, and Dame Elizabeth Salusbury, to appear in Chancery to hear judgment, &c.

Wildman Solicitor

Tested 30 July 1784.

Subpœna

Subpoena to hear Judgment.

409

Subpoena William Stiles to appear in Chancery, returnable the 8th. of November, to hear judgment the 11th. of November, at the suit of Geoffrey Stradling.

The writ is in the following form,

“ *G E O R G E the Third*, by the grace of *G O D*, &c.
“ to *William Stiles* greeting, For certain causes offered before us in our Chancery, we command and strictly enjoin
“ you, that laying all other matters aside, and notwithstanding any excuse, you personally be and appear before
“ us in our said Chancery, *the eighth day of November next*, wheresoever it shall then be, to answer concerning
“ those things which shall be then and there objected to
“ you; and to do further and receive what our said
“ court shall have considered in this behalf. And this
“ you may in no wise omit, under the penalty of one
“ hundred pounds, and have there this writ. Witness
“ ourself at *Westminster* the 30th day of *July*, in the 24th
“ year of our reign.”

Courtney and Courtney.

Indorsed by the court to hear judgment, the eleventh day of November, at the suit of Geoffrey Stradling.

Label, William Stiles to appear in Chancery, returnable the 8th of November, to hear judgment the 11th of November, at the suit of Geoffrey Stradling.

This writ is always made returnable three days before the day on which the cause is set down to be heard, unless the return day happens on a Sunday; in which case a day more is allowed: the indorsement on the writ shews the day on which the cause is appointed to be heard.

If the day to hear judgment, be the first, second, or third in term, whereby the three days in term before the day
to

to hear judgment cannot be ascertained, the writ must be made returnable on a general return day; as where the cause is set down for the first day of causes in *Hilary* term, the process must be made returnable in eight days of *St. Hilary* to hear judgment the 24th of *January*.

Three persons may be inserted in one writ: a man and his wife are accounted only as one person.

The service of this process is similar to that of a *subpoena* to appear and answer. The service of the label must be *personal*, shewing the body of the writ under seal at the time of service; at the same time leaving the label with the party served. The body of the writ under seal may be served *personally*, or left at the party's last place of residence with one of the family. If two or more are in a *subpoena*, one or two must be served with labels; in all cases of the service of the label observing to shew the body of the writ under seal at the time of service*.

The time of service is to be regulated by the residence of the adverse party. If he live in *London*, or within twenty miles, this process should be served ten days exclusive before the time to hear judgment, save in the short vacation between *Easter* and *Trinity* term, and then eight days. If the adverse party reside above twenty miles from *London*, the service must be fourteen days, exclusive before the time to hear judgment, except in the short vacation, when it need be served only ten days†.

Where an infant is defendant, the affidavit of service to hear judgment must be, that the guardian was served, not the infant. Though the infant want ever so little of 21, the service must be upon the person appointed by the court to defend him‡.

A defendant absconding to avoid being served with the process to hear judgment, sometimes occasions an application to the court, to substitute a service upon the clerk

* Ord. Canc. 96. † Prac. Reg. 349. ‡ 2 Wms. 643.

Subpoena to hear Judgment. 411

in court. Or if he likewise be out of the way, and no body attends at his office; as the orders for service are discretionary, the court will, upon application make an order that service upon the solicitor be good service, a copy of such order being left at the defendant's last place of abode with some of the family*.

The party serving this process should always make an affidavit of the service to obviate any inconvenience which may possibly happen at the hearing; and an office copy from the affidavit office should be ready in court, when called for. If the defendant do not appear, the affidavit of service will become necessary to shew the service of the process, and a decree *nisi* may be made thereon.

* 2 Vez. 23.

Hearing.

THE pleadings being regularly filed, publication duly passed, and the cause set down for hearing, and process served to bring in the party to hear judgment, the suit comes in rotation to be heard before the Lord Chancellor, or Master of the Rolls.

The Register on the evening previous to the hearing of the cause for the ensuing day, usually makes out a paper of the causes which stand next for hearing; one copy whereof is fixed up in the Register-office, and another copy is put up in the Six-clerks office. There are generally twelve causes in each paper, and very rarely it happens that the paper is gone through in one day. The last cause, if it happen to be called on, is always privileged; that is, neither party can be obliged to pay costs of the day for not attending when called on, the same being never struck out of the paper for non-attendance. The Register's book of causes, pleas, demurrers, exceptions, &c. is always open in office hours at the Register-office for the inspection of all persons to inform themselves if a cause is set down to be heard, how far a cause stands out of the paper, and when likely to come on to be heard.

The method of hearing causes is usually this; the parties on both sides appearing by their counsel, the plaintiff's bill is first opened, or briefly abridged, and the defendant's answer also, by the junior counsel on each side: after which the plaintiff's leading counsel states the case, and the matters in issue, and the points of equity arising therefrom, and then such depositions as are called for by the plaintiff's counsel are read by one of the six-clerks in *Westminster Hall*,*

or

* The solicitors on each side must take care to have the pleadings and other records signed by the respective six clerks; this
their

or by the solicitor or his clerks in *Lincoln's-Inn Hall*, and the plaintiff may also read such parts of the defendant's answer, as he thinks material or convenient*. After this the rest of the counsel for the plaintiff make their observations and arguments; then the defendant's counsel go through the same process for him, except that they may not read any part of his answer; and the counsel for the plaintiff are heard in reply, and conclude the argument. When all are heard, the court pronounces the decree, adjusting every point in debate according to equity and good conscience, which decree being usually very long, the minutes of it are taken down, and sometimes read openly in court by the register.

All parties generally take a copy of the minutes from the register, and if it be apprehended that he hath made any mistake, or the court hath been led into an error, by wrong information and misconception; the decree in minutes may be rectified, on application by motion or petition for that purpose.

Cross causes between the same parties are generally contrived to be brought on to be heard together, at the request

their clerks in court will procure upon application, for if they fail herein, and the fix clerk in open court insists the office-copies not signed ought not to be read, the cause will be struck out of the paper. By the orders in Chancery, "No copies of bills, answers, or other record shall be delivered out of the office, before it be signed by the proper fix clerk to whom it belongs, with his proper hand-writing, or by his deputy in his absence. Nor shall any copy not so signed be made use of in court, or before any master; which all clients are to take notice of, to the end they may be prepared with such copies at the hearing of the cause." *Ord. Canc.* 104.

* On a trial at law, if the plaintiff reads any part of the defendant's answer, he must read the whole of it; for by reading any of it, he shews a reliance on the truth of the defendant's testimony, and makes the whole of his answer evidence.

of

of either party by motion or petition of course, if the answer in the cross cause come in before publication passes in the original cause *, or in convenient time before the original cause is set down, or comes on to be heard †. This chiefly depends upon the vigilance and attention of the plaintiff in the cross cause, for where the defendant in the cross cause is in contempt for not putting in an answer to the cross bill, the plaintiff in the cross cause (defendant in the original cause) should move to enlarge publication in the original cause until a fortnight after the answer comes in to the cross bill ‡, which upon special motion will be in most cases granted; if this precaution be not observed, the original and cross cause cannot be brought on together, (the course of the court being in such cases not to stay proceedings, but publication only.) So if the plaintiff in the cross cause, after publication past in the cross cause as well as in the original cause, or if both causes are set down for hearing, neglect to serve process to hear judgment; in all or either of these cases, the original and cross cause cannot be brought on to be heard at the same time, except the adverse party consents. Sometimes the cross bill is filed so late, that publication has passed in the original cause, and then it is usual to set down the cross cause upon bill and answer, and particularly so, if the object of the cross bill is merely to purge the conscience of the defendant, (plaintiff in the original cause) and thereby in a forlorn case to create a de-

* It has been observed in the preceding pages of this work, that the answer to a cross bill should always be got in before publication passes in the original cause, unless the plaintiff in the cross cause means to rest his defence upon the discovery arising out of the defendant's answer, and to go to hearing upon the depositions taken in the original cause, or to examine only to points not examined to in the original cause. 3. *Px. Alm.* 9, 10.

† *Prac. Reg.* 188.

‡ 2 *Vez.* 336. 1 *Atk.* 21. 291.

fence. The court never permits witnesses in a cross cause, to be examined to the same points already examined in the original cause. Matter *dehors* that examination may be examined to in the cross cause: where witnesses have been examined in each cause, and both are ripe for hearing; it becomes in some cases expedient for the plaintiff in the original cause, if the cross cause hath acquired priority in the paper of causes, or *vice versa*, when both causes are set down for hearing, and process served to hear judgment in each, to move for leave to bring forward his cause (if necessary) that both original and cross cause may come on to be heard at the same time, or that the cross cause or original cause (as the case may be) may stand adjourned so that both causes may come on to be heard together. Upon an application of this sort, it may be necessary to engraft a request that the depositions taken in the original cause may be read at the hearing of the cross cause, *et sic è converso*. This is generally the case where both causes are set down, the one preceding the other, and some other causes intervene. A motion of this nature should precede the day whereon the cause first set down is appointed to be heard, otherwise it should seem, that if the court indulges the party in such an application made upon the day whereon the cause stands in the paper for hearing, it would be upon payment of costs of the day *viz.* five pounds.

If there be several suits here, which are merely cross causes between the same parties touching the same matters; the depositions taken in one cause, may (by order) upon hearing be used in the others*.

Where there were cross causes, publication being past in the first, but not in the second, an order was had, that the depositions in either cause might be used in both: yet said, the depositions in the first cause, could not be used in the second †.

* *Px. Alm.* 23.

† *1 Ch. Ca.* 237.

Where

Where a cause is set down at the defendant's request, if the plaintiff not served with process *ad audiendum judicium*, and his counsel attend at the day; and the defendant by his counsel attend not, yet the plaintiff shall have no costs; for he was not compelled to appear, and the defendant might chuse whether he would go on to have the cause heard*.

If the party who procures a cause to be set down for hearing is not ready to hear it at the day, but desires it may stand over to another day; he must ordinarily pay the other who appears, the costs of the day, (*viz.* five pounds) if the court see fit to indulge a further day †.

If upon hearing, the plaintiff appears intitled to relief, but the case made by the bill is insufficient to ground a complete decree, the court will frequently give the plaintiff leave to file a supplemental bill, to bring the necessary matter, in addition to the case made by the original bill, before the court ‡.

Hearing upon Bill and Answer.

If the plaintiff finds sufficient matter confessed in the defendant's answer, to ground a decree upon, without further proof, he should proceed to the hearing of the cause upon bill and answer only. As if the plaintiff makes his title by a will, or other conveyance in the defendant's hands, and the defendant, by answer confesses it: but in this case, the defendant's answer is to be wholly read, and must be admitted to be true in all points; and no other evidence is to be admitted, unless it be a matter of record to which the answer refers, and is proveable by the record itself. The plaintiff should therefore be well advised, that the

* *Cl. Tut.* 31. † *Prac. Reg.* 186. ‡ 3 *Atk.* 133.

court be not put to unnecessary trouble, and himself to a certain charge, in bringing his cause to a hearing, which will not bear a decree*.

When the plaintiff replies to an answer, and without serving a *subpœna* to rejoin, or rule given to pass publication, brings the cause on to a hearing, the answer will be taken wholly true, as if there had been no replication; for the defendant's opportunity of proving the answer, is taken away from him†. But it should seem that a defendant might in such case appear *gratis*, to rejoin, and examine witnesses, and proceed on with the cause. If the *subpœna* to rejoin be not served, although sued out; or the defendant do not appear *gratis* to rejoin, the cause must be heard upon bill and answer, and no proofs admitted to be read‡.

If the plaintiff go to hearing on bill and answer, and the court shall not see cause to make a decree thereupon for want of sufficient matter confessed by the answer, the bill shall be dismissed with costs, (forty shillings,) or the plaintiff may be admitted to reply, if he desires it, paying down five pounds, or such other costs as the court shall think fit for the day, within four days after such hearing; which if he does not, the dismissal must stand, and being signed and inrolled, may be pleaded in bar to a new bill for the same matter, &c. §.

Bill against three several executors of three joint factors, for account of goods; one of them swore he believed and hoped to prove, that the plaintiff was satisfied his demands. The plaintiff replied against the other two, and brought the cause on by bill and answer, as against the third. It was insisted that the plaintiff could have no decree, for by thus bringing on his cause, defendant's answer must be

* *Ord. Canc.* 100. *Pr. H. Ch.* 18.

† *Prac. Reg.* 317. 1 *Cb. Ca.* 21.

‡ *Toth.* 46.

§ 1 *Px. Alm.* 14.

taken to be true, and though he does not directly swear the money paid, yet he swears he believes and hopes to prove it paid; but by the plaintiff's not replying, he is excluded the benefit of his proof, and the practice was cunning. The Master of the Rolls ordered the plaintiff to pay costs, and left the plaintiff at liberty to reply to the other defendant*.

When Plaintiff does not appear.

If the plaintiff procures the cause to be set down for hearing, and serves not the defendant with a *subpœna* to hear judgment, if the defendant attend, and the plaintiff does not go on, the bill is sometimes dismissed: or however, the plaintiff must pay the defendant the costs of the day, (five pounds,) for the plaintiff is intended to be always ready and present in court to prosecute his suit: and the defendant might find the cause, in the paper, or book of causes, and so had reason enough to attend for his own safety, because the *subpœna* might be left with some of his family, which is good service, though he had no notice of it †. But said, if the cause were procured to be set down by the defendant himself, and the complainant appear not, the defendant shall take no advantage thereof, except the *subpœna* to hear judgment appears to have been served, for otherwise the complainant is in no fault ‡. And when

* Vern. 140.

† It should seem by the modern practice, that although a plaintiff sets down his cause, yet, upon further consideration of the matter, he may not think fit to serve the defendant with a *subpœna* to hear judgment. In this case, the defendant must hear the cause, *ad requisitionem defendentis*, if he will have the bill dismissed with costs, though sometimes a decree is made against him. *Gilb. Chan.* 157.

‡ *Prac. Reg.* 192.

a cause is called on, and the defendant's counsel is ready, and appears, and no counsel appears for the plaintiff, the court always calls upon the defendant to prove service, and if he cannot do that, he cannot pray to have the bill dismissed. All the court can do in this case is, only to strike the cause out of the paper; but if the defendant proves service of the *subpæna* to hear judgment, the bill will be dismissed with costs. This proof of service must be upon the affidavit of the party, *viz.* "That he was on such a day served with a *subpæna* to hear judgment at the plaintiff's suit," or any other person with whom the body of the *subpæna* was left, may make affidavit thereof, which must be filed, and an office copy taken to be read in court.

When Defendant does not appear.

The cause being called on, and the bill opened by the plaintiff's counsel, no counsel appearing for the defendant to open his answer, the court calls upon the plaintiff to prove service of the *subpæna* to hear judgment; and an office-copy of the affidavit of service being read, and it appearing to the court, that the defendant has been duly served therewith, the answer of such defendant is ordered to be read, and it is in general no farther read than this, *viz.* "The answer of *William Stiles* defendant, to the bill of complaint of *Geoffrey Stradling*, complainant, the said defendant now, and at all times hereafter saving and reserving to himself all, and all manner of benefit, and advantage of exception, &c." And if the court upon such hearing shall find cause (which is generally the case) to decree for the plaintiff, yet a day shall be regularly given to the defendant to shew cause against the same*. The plaintiff's counsel are upon such default of the defendant intitled to a decree according to the prayer of their bill, *nisi causa*, without reading any evidence, and they generally

* Ord. Canc. 112.

take care to pray a right decree, otherwise they will hear of it again.

In case of a bill brought to establish a will against an heir at law, the court notwithstanding he makes default, will order the proofs of it to be read; for the will could not otherwise be well proved *.

Where the bill and answer have been opened, and the cause adjourned over; if the defendant make default at the next hearing, the decree shall be absolute; for the second hearing is to be considered as a continuation of the former, when he did appear †.

Where there are not proper Parties.

In all suits great care should be taken, that there be proper parties for and against whom the court may respectively make a decree, and also that there be all necessary parties; for if upon the face of the bill, it appears that any party is wanting, the court, many times at the hearing, will not make a decree for want of proper parties. Or if a decree should be obtained, it may be reversed, or if it be not reversed, yet none but the parties to the suit, and those claiming under or through them are bound by it.

If the defendant objects for want of parties (as he may) unless restrained by some interlocutory order ‡, whereby he is to take no advantage for want of parties; this should be done upon opening of the pleadings before the cause is gone into upon the merits. Where it appears to the court that a very material party is wanting, without which no complete decree can be made; as where a man seeks an account of the profits or sale of a real estate, and it appears

* 3 Atk. 25. † Mos. 186.

‡ An order to restrain a party from excepting for want of parties at the hearing is void, unless by consent. *Vera*. 122. *Arg.*

upon the pleadings, the defendant is only tenant for life, and consequently the tenant in tail cannot be bound by the decree. So where one legatee brings a bill against an executor, and there are many other legatees, (none of whom will be bound by the decree, or by the account to be taken of the testator's assets,) and each of these legatees may draw the account in question over again. Or where several persons are intitled as next of kin under the statute of distributions, and only one of them is brought on to a hearing. Or when a real estate is to be sold under a will, and the heir at law is not brought on to a hearing. In these and all other cases, where the decree cannot be made uniform and complete, for as on the one hand, the court will do the plaintiff right, so on the other hand they will take care that the defendant is not doubly vexed, he must not be left under precarious circumstances, because of the plaintiff, who might have made all proper parties at first, and whose fault it was that it was not so done. In these cases the ancient rule was to dismiss the bill with costs *, for want of necessary parties. The present course of the court for some time past hath been, and now is, not to dismiss the bill †, but to let the cause stand adjourned over, on payment of costs of the day, (five pounds) and to direct the plaintiff to amend his bill, by adding proper parties. In many cases the dismissal would be singularly hard, as where the party wanting to be brought

* Discretionary in the court to dismiss the bill, without prejudice, or let it stand over with liberty to amend. 1 *Wms.* 428.

† A bill in Chancery is never dismissed for want of parties, but stands over, upon paying costs of the day. A decree of Sir *Joseph Jekyll's*, in a cause at the Rolls, to dismiss a bill for want of parties, was reversed afterwards for that reason. A decree of the same nature in the Exchequer, was afterwards reversed in the House of Lords. 2 *Atk.* 15.

on, is a party purely *pro forma*, as a trustee, or executor. It should seem that the court to supply the want of parties in some instances, as in case of an administration *de bonis non* &c. would direct, that upon the plaintiff producing such administration, before the Master, the account should proceed; if a defendant be added after publication, the cause must be heard *quoad* that defendant upon bill and answer. But when the party which is wanting, becomes a substantial and material party, and who may controvert the plaintiff's right to the demand in suit, and when he may deny it by his answer, and put the plaintiff and the other defendants who have answered, to examine witnesses *de novo*; and where the plaintiff must reply to this new party's answer, and both parties examine all over again, and the cause set down to be heard, as against this new defendant. In such case, it should seem that the bill should be dismissed with costs, but this is wholly in the discretion of the court, according to the particular circumstances of the case; for although a dismissal cannot be pronounced for want of parties simply, yet cases may arise, where the want of proper parties coupled with other matters, may induce the court to lean in favour of a defendant, harassed by a litigious plaintiff.

What Evidence shall be admitted at the Hearing.

A bill in another cause is not to be read as evidence against the plaintiff named in it, unless it be proved, that it was exhibited with his privity; for any one may file a bill in another name. 1 *Ch. Ca.* 64.

The answer of the defendant may be read against him; but then the whole may be read by the other party.

If a defendant being an infant, answers by guardian, and at full age neither amends, or makes a new answer, as he may do, but prays a hearing of the cause *de novo*, his answer shall be evidence against him. *Eq. Ca. Abr.* 4.

If

If the plaintiff is charged by an answer, he must discharge himself by proof, and cannot do it by reading the whole answer. 2 *Atk.* 383.

The answer of a defendant disclaiming all right to an estate, and not brought to a hearing, shall not be read against another defendant. 2 *Atk.* 39.

If a defendant by his answer denies an agreement, &c. it ought to be proved by two witnesses, for one is not sufficient. 2 *Ch. Ca.* 8. 1 *Vern.* 161.

If the denial of a defendant by answer is not clear, positive, and full to the fact, the court will decree on the testimony of one witness. 3 *Atk.* 646. 1 *Vez.* 64.

So if defendant's answer is equally strong with the deposition of one witness, there can be no decree against him, but if concurring circumstances support the deposition, there may. 2 *Atk.* 19. 140. 3 *Atk.* 407.

If defendant by answer in another cause, has admitted that a deed in question a release, a release once existed, and defendant has the lease belonging to this release, plaintiff may read the draught of the release, if well proved. 1 *Vez.* 387.

It is a motion of course, that a defendant for form's sake, may be examined, saving just exceptions. 2 *Atk.* 228.

The evidence of a defendant, *particeps criminis*, and interested, shall not be read, *secus*, if only attorney and trustee. 2 *Vez.* 627.

Co-defendants may read against each other whatever is proved for plaintiff. 2 *Vez.* 622.

A decree, or examination of witnesses in a former cause between the same parties, may be read as evidence, though not conclusive, although thereby there is not an opportunity of examining between co-defendants. 2 *Vez.* 89.

A decree in a former cause wherein the then lessee, and not the impropiator, was plaintiff, and the then tenants were defendants, admitted as evidence. *Bunb.* 110.

A decree in a tythe cause cannot be read, unless proved to be touching the same lands or tythe. *Bunb.* 284.

Depositions in cross causes between the same parties, heard at the same time shall be allowed upon both causes by special order.

If the point in issue in the cross cause, was not in issue in the original cause, the depositions in the original cause, cannot be read in the cross cause. *Bunb.* 321.

Depositions in a cross cause, brought after a decree pronounced in the original cause, cannot be read touching the matters in issue in the original cause, but may as to matters not in issue in the original cause. *3 Atk.* 501.

Depositions in a former cause in Chancery, admitted to be read, upon motion the same matter being then under examination as now; though neither the plaintiff, nor any under whom he claimed was party to the former cause. *Ch. Ca.* 73. 75.

So depositions in a cause dismissed for want of equity for relief. *Ch. Ca.* 175.

Depositions for a legatee against an executor to prove assets, in a bill brought by another legatee for the same intent admitted. *1 Vern.* 413.

If on bill brought by devisees to establish a will, the heir at law prevails to set it aside, he shall have the benefit of the depositions in that cause, in another cause brought by him against a purchaser before the answers came in, in the former. *2 Atk.* 174.

But where the former cause was dismissed for irregularity, the depositions therein can never be admitted in another cause for the same matter. *Ch. Ca.* 175.

If plaintiff or defendant obtain an order for the use of depositions in another cause, the adverse party may use them without motion, unless he be restrained by the same order. *Ord. Canc.* 109.

The depositions of a defendant not interested, may be read for another defendant, and also for plaintiff, though at law, a defendant cannot be examined for plaintiff: but if

if defendant may be liable for costs, it cannot be read.

3 *Atk.* 401.

The deposition of a defendant against whom plaintiff can give no evidence, may be read for another defendant.

3 *Wms.* 288.

So the deposition of one defendant, charged with a fraud, cannot be read for another defendant, as it may tend to excuse him with regard to his own costs. 1 *Atk.* 203.

The evidence of a co-defendant, *particeps fraudis* and interested, shall not be read, though if only trustee, it may, for it goes to his credit only, and not to his competency. 2 *Vez.* 629.

If the cause is brought on to a hearing, and stands over with liberty to add a party, if he is a material defendant, and concerned in interest, the depositions taken before, cannot be read against him. *Bunb.* 310.

Depositions *de bene esse*, taken many years before, may be published with depositions in a supplemental cause, on affidavit that some of the witnesses are dead, and that nothing can be heard of the others on enquiry, but without prejudice to exceptions. 2 *Vez.* 296.

Though depositions taken *de bene esse*, are irregular, they cannot be objected to at the hearing, the order to pass publication should be discharged. 2 *Atk.* 189.

Depositions *de bene esse*, shall be published, where it is morally impossible to examine the witnesses in chief; as if a commission has issued to examine in *Sweden*, the King has refused to let it be executed, the commission is come back, and the king of *Sweden* has ordered a public examination before his own judges. 2 *Vez.* 325. 336.

An executor in trust, is not a good witness for his *cestui que trust*, though a bare trustee is. 3 *Wms.* 180.

If a plaintiff, executor examines his son, and dies, leaving his son executor, who also takes out administration, *de bonis non*, of the original testator, and he revives, yet his deposition in the original cause may be read. 3 *Atk.* 615.

If

If a creditor brings bill against an executor for an account of assets, the evidence of a co-executor, tending to increase testator's estate, cannot be read, for he has an interest. 3 *Atk.* 95.

The evidence of a husband shall be admitted, though his wife is a defendant, if the interest of a third person is concerned. 1 *Atk.* 451.

The deposition of the wife of a *prochain amy* of plaintiff's *feme covert*, cannot be read for plaintiff. 3 *Atk.* 511. 547.

A bond or mortgage deed is *prima facie* good evidence, but if there are manifest signs of fraud in the obligee, he shall be put to prove actual payment. 3 *Wms.* 288.

The evidence of one having an interest cannot be read, though he is satisfied, unless a release is produced. 2 *Atk.* 15.

If there is an agreement in writing between *A.* and *B.* the steward of *C.* for sale of *A.*'s estate to *C.*; but the covenant by *B.* and he bound in penalty for the performance, and *A.* brings bill against *B.* and *C.* charging there was a defeazance prepared, but the execution prevented by *B.*; *B.*'s deposition cannot be read for *C.*; especially if *B.* has examined witnesses. 2 *Vez.* 219.

Depositions to prove that plaintiff, (who sues for dower) had acknowledged a bond to be given in lieu of dower, though it does not appear on the face of it, cannot be read. *Wilf.* 34.

If a person joins fraudulently, in granting an estate, without the usual covenants, but only that he has done no act to incumber, his deposition may be read, to impeach his title to the estate, and to shew it was done to carry on the fraud. 2 *Atk.* 228.

The evidence of a witness is not invalidated by reason of his tender years, if it is of a circumstance likely to make a great impression on his mind. 2 *Atk.* 243.

The deposition of heathen idolators sworn according to their ceremonies in the most usual and solemn manner, has
under

under special circumstances, been admitted in evidence.
1 *Atk.* 21.

On an appeal from the Rolls, the appellant, on petition, may be let in to read new evidence, not read there, provided he will give up his deposit. 2 *Atk.* 408.

A deed mentioned in the bill, to which the defendant by answer said, *he believed there was such a deed as in the said bill is set forth, &c.* shall not be read without proof; for the confession does not admit more than is alledged by the bill, and does not warrant the reading of a deed with like clauses. 2 *Vent.* 361.

The mark of impropiator's predecessor admitted as evidence of a mortuary. *Bunb.* 46.

Ministers accounts though subsequent to 31 *Hen.* 8. may be read in a tythe cause. *Bunb.* 284.

Entries in the accounts of the lord's steward, admitted to prove a *modus* to the vicar, in discharge against the impropiator, the plaintiff. *Bunb.* 180.

A bailiff's accounts have been admitted as evidence of quit-rents, *sed. qu.* as to a lord of a manor's books. *Bunb.* 46.

That an account may be evidence of quit-rents, it must appear to be a bailiff's, and signed by him. 2 *Atk.* 140.

An entry in a man's book of accounts may, on a reference to a Master be read, not as evidence of the debt, but of a claim of it in the life-time of the deceased. 2 *Vez.* 54.

Letters or books of an agent or servant, may be read, if he is dead, otherwise not. 2 *Vez.* 190.

The probate of a will may not be read in case of a real estate, the defendant has admitted he believes there is such a will, *secus* if his admission had been full. *Bunb.* 6.

So a deed proved upon a commission against one defendant only, shall not be admitted against the other defendant. 2 *Vent.* 361.

Exhibits proved *vivâ voce* at the hearing, cannot be read where there is a right to controvert, or to a cross-examination. 2 *Vez.* 472.

A deed may be proved *vivâ voce* at the hearing, *secus* as to a will. 3 *Wms.* 91.

The defendant's witness proves a deed, and refers to it in his deposition; the plaintiff cannot compel the defendant to produce the deed at the hearing, the reference thereto not making it part of the deposition, unless mentioned therein *in hæc verba*. 3 *Wms.* 35.

A corporation, as trustees for a charity, shall not be obliged to produce their books relating to the trust, though they submitted by their answer to produce as the court shall direct. *Bunb.* 290.

The court will order publick books (as of a manor court) to be produced, in whatever hands they are, but not private. 2 *Vez.* 578.

An executor who was counsel, and drew the draught of an annuity, to set aside which, a bill is brought, shall be obliged to leave the draught with his clerk in court, but not on oath. 2 *Atk.* 214.

If a bond has been delivered up to plaintiff, he cannot read parol evidence to the contents of it, whether the bill is to be relieved against it, or whether it comes in by way of collateral evidence. 1 *Vez.* 503.

An inquisition of lunacy, and other inquisitions, may be read, but are not conclusive evidence, for they may be traversed. 2 *Atk.* 412.

Acts of the court as a decree, or order in another cause between the same parties, may be read without order *Mof.* 188.

Decree.

A Decree is a final sentence, or order of court, pronounced on hearing and understanding all the points in issue, and determining the right of all the parties in the suit, according to equity and good conscience.

The decree is either *interlocutory* or *final*. It very seldom happens that the first decree can be final, or conclude the cause; for if any matter of fact is strongly controverted, this court is so sensible of the deficiency of trial, by written evidence, that it will not bind the parties thereby, but usually directs the matter to be tried by jury; especially such important facts as the validity of a will, or whether *A.* is heir at law to *B.*; or the existence of a *modus decimandi*; or real and immemorial composition for tithes. But as no jury can be summoned to attend at this court, the fact is usually directed to be tried at the bar of the court of King's Bench, or at the assizes upon a *feigned issue*. For (in order to bring it there, and have the point in dispute, and that only put in issue,) an action is feigned to be brought, wherein the pretended plaintiff declares, that he laid a wager of five pounds with the defendant, that *A.* was heir at law to *B.*; and then avers that he is so, and brings his action for the five pounds. The defendant admits the wager; but avers that *A.* is not heir at law to *B.* and thereupon, that issue is joined which is directed out of Chancery to be tried, and there the verdict of the jurors at law determines the fact in the court of equity.

So if a question of mere law arises in the course of a cause, as whether by the words of a will, an estate for life or in tail is created, or whether a future interest devised by a testator, shall operate as a remainder, or an executory devise; it is the practice of this court to refer it to the opinion of the judges of the court of King's Bench, upon a case stated for that purpose; wherein all the material facts

facts are admitted, and the point of law is submitted to their decision; who thereupon hear it solemnly argued by counsel on both sides, and certify their opinion in writing to the Lord Chancellor. And upon such certificate, the decree is usually founded. Another thing also retards the completion of decrees; frequently long accounts are to be settled, incumbrances and debts to be enquired into, and an hundred little facts to be cleared up, before a decree can do full and sufficient justice. These matters are always by the decretal order on the first hearing, referred to a Master in Chancery to examine, which examination frequently lasts a long time, and then he is to report the fact as it appears to him, to the court. When all issues are tried and settled, and all referencies, the cause is brought to hearing, upon the matters of equity reserved; and a *final* decree is made.

The decree being pronounced, copies of the minutes taken by the registers in court, are usually applied for, by all parties respectively, or the several parties employing different solicitors in the suit; and this is usually *ex abundanti cautela*, that if the same are objectionable, attention may be paid thereto in due time. The party in whose favour the decree is made, carries the brief given to one of his senior counsel, to the register of the day, when the cause was heard; (for each register takes his turn alternately,) and bespeaks the decree to be drawn and up, the adverse party usually bespeaks a copy. Sometimes the party drawing up the original decree, neglects to return it to the register, whereby the adverse party is delayed in having a copy, this drives the party injured to his remedy, by motion in court, "that the adverse party's solicitor may forthwith return to *A. B.* the register, the decree made on the hearing of the cause, on such a day, which was by him drawn up, in order that the party applying may have or take a like copy thereof; and that the same may be passed and entered." Notice in writing, of this application should be served upon the adverse clerk in court *personally*, or on his

His agent at his seat in the Six-clerk's office, by leaving a copy of such notice at the time of service, the day next but one, before the day whereon the motion is intended to be made. The decree being returned, and an office-copy taken by the adverse party, the decree is as yet inchoate, and imperfect, two very material requisites remaining to be done * previous to the perfecting thereof, *viz.* *passing* and *entering*; the first of these is done, by application to the register to appoint a day for passing the decree, which he does, by sending a note in writing to the adverse party's clerk in court, informing him that the decree will be passed on such a day, and requiring him to bring his copy, and to attend at the passing, or that he will pass the decree without him. This is done, to give all parties an opportunity of pointing out any errors or objections which he may have, and which the register can rectify. If the minutes taken at the hearing, are doubtful, or if either party thinks himself really aggrieved by the decree, as it is then going to be passed, or if he conceives, they are materially and essentially wrong, or contrary to the plain sense and meaning of the court, when the decree was pronounced, in any of these cases, an application should be made before the decree is passed, either by motion or petition, that the minutes of the decree may be rectified, stating therein the specific matter to be added or altered, and upon hearing and considering of the argument on both sides, the court rejects or adopts the alteration proposed. The decree being passed, previous to any proceedings being had thereon, the last remaining form must be performed, *viz.* the *entry* thereof at the entering books in the register office; this is done by leaving the original decree at the entering books, and the decree appearing by the register's

* It is no decree until drawn up and passed by the register, the minutes are only a warrant for a decree. 2 *Freem.* 46.

signature to be passed, a true copy thereof is entered, of course into the books ; six-pence is paid for every side, and one shilling duty for every ten sides. If the party in possession of the original decree, neglects or refuses to enter it, the office-copy regularly passed and signed, may be entered in like manner as the original. And where any delay appears in perfecting the entry of the decree, the office-copy of the original decree, upon application to the register, will be signed by him, if the original has been previously left at the entering books, and the office-copy so authenticated will be sufficient to authorise any proceedings in pursuance of the decree. For unless the original decree appears to be entered, or the office-copy is signed by the register as before mentioned, the Master to whom the matters in the decree are referred for enquiry, will not issue any warrants, or suffer proceedings to be carried on according to the direction of the decree, or if inadvertently proceedings are had, they are irregular and voidable.

The entry of the decree is restricted by the course of the court to a certain period, " All decrees and dismissions pronounced upon hearing the cause in this court, are to be drawn up, signed, and inrolled, before the first day after the next Michaelmas or Easter term, after the same shall be pronounced respectively, and not at any time after, without special leave of the court,*" signified by order made upon application, by motion or petition, of course to enter the decree *nunc pro tunc*, and the order so made being drawn up, (the counsel's-brief on motion signed by him, being left at the register-office, when the order is applied for there) and passed and entered at the same office, the order must be served upon the entering clerk at the register-office, when the decree is left to be entered ;

* Ord. Canc. 116.

without this order a decree not entered within the time prescribed by the course of the court cannot be entered.

The rules and orders of court, are silent as to the *entry* of the decree; the drawing up, (in which may be included the entry) signing and inrolling only, are provided for; but as the entry must precede, as well the signing and inrollment, as any proceeding in pursuance of the decree*, the order seems to imply that the entry must be within the time prescribed for the inrollment, and this seems to be the spirit of the order, though not the letter.

Decree nisi, or unless Cause.

The minority, or non-appearance of a defendant regularly served with process to hear judgment, precludes the plaintiff from an absolute decree in the first instance; the court in either case, proceeds to make a regular decree upon the merits of the case, superadding thereto a provisional clause, "That such decree is to be binding upon the defendant, unless being served with process, he shall within a limited time, shew cause to the contrary." And this decree being *sub modo* only, is emphatically called a decree *nisi*, or unless cause.

The interest of infants, is so far regarded and taken care of, in this court, that no decree can be regularly made against an infant defendant, without having a day given him to shew cause, when he comes of age†. A decree against

* Mos. 71.

† *Eq. Ca. Abr.* 280. This may seem too generally laid down, for although an infant be foreclosed without a day to shew cause after he comes of age; yet if lands are decreed to be sold for payment of debts, the infant will be bound. 1 *Vern.* 295. So if lands are devised to be sold for payment of debts, the lands

against an infant, always concludes with a proviso, " That
 " the decree is to be binding on the infant, unless on be-
 " ing served with a *subpœna* to shew cause against the same,
 " he shall, within six months, after he shall attain twenty
 " one years, shew unto this court good cause to the
 " contrary."

Where no counsel appear for defendant at the hearing, and process appears to have been duly served, the answer of such defendant shall be read; and if the court, upon such hearing, shall find cause to decree for plaintiff, yet a day shall regularly be given to the defendant, to shew cause against the same, and the order is to be penned by the register accordingly*, which is usually in the following form. " And
 " this decree is to be binding upon the defendant, unless
 " he being served with a *subpœna*, for that purpose, shall,
 " at the return thereof, shew unto this court good cause
 " to the contrary. But before the said defendant is to be
 " admitted to shew such cause, he is to pay unto the plaintiff
 " his costs of this day's default of attendance to be taxed
 " by the said Master," (the Master to whom the matters in the decree are referred.)

The decree *nisi* against an infant being drawn up, passed and entered, the plaintiff proceeds to carry the matters therein directed into execution: and herein seems to consist the distinction between a decree *nisi*, against an infant defendant, and a decree *nisi* upon default of appearance.

may be decreed to be sold without giving the heir, or infant, a day to shew cause. Or if the legal estate is in trustees, and an execution of the trust is directed, the infant is not intitled to a day to shew cause; 2 *Kel.* 7. *Secus*, if he is directed to do any act; as to join in the sale, &c. 2 *Vern.* 429. as if there be a mortgage, and a disputable title, and no money can be raised by assignment thereof, equity will not decree a foreclosure, till the infant arrives at age. 2 *Ventr.* 351.

* Ord. Canc. 111.

A decree *nisi*, against an infant partakes so far of the nature of an absolute decree, as to authorise proceedings under it, as in ordinary cases: nor does it seem reversible, but for error, or fraud and collusion* between the plaintiff, and the guardian of the infant. A decree for default of appearance at the hearing is a mere nullity, until made absolute; to effectuate which the plaintiff having drawn up, passed and entered the decree, must sue out a

Subpœna to shew cause

Against the decree being made absolute; this writ is a judicial process, and must be made returnable in term time, on a day certain. The service is similar to all other *subpœnas*, personally by giving the label, shewing the writ under seal at the same time if two defendants or more, leaving the body of the writ under seal, at the dwelling-house or place of residence of the defendant last served, with one of the family; and the latter seems the proper service, if there is only one defendant†. Three defendants may be inserted in one writ. Husband and wife are accounted as one person.

The decree *nisi*, being produced at the *subpœna*-office, accompanied with a *præcipe* in the following form, the writ will be made out accordingly.

Subpœna William Stiles to appear in Chancery, the 24th day of January, to shew cause against a decree, dated the 16th November, 1783. at the suit of Geoffrey Stradling.

Birch Solicitor.

Tested 20th January, 1783.

* Mos. 308.

† 3 Akt. 567.

The Writ is in the following Form.

George the Third, by the grace of God, of Great Britain, &c. to William Stiles, greeting, For certain causes offered before us, in our Chancery; we command and strictly enjoin you, that laying all other matters aside, and notwithstanding any excuse, you personally be and appear before us in our said Chancery, *the twenty fourth day of January instant*, wheresoever it shall then be, then and there, to shew good and sufficient cause, in a certain matter, in our said Chancery now in controversy between *Geoffrey Stradling* complainant and *William Stiles* defendant, according to the true intent and meaning of a certain order of our said court made between ye in this cause, bearing date the *sixteenth day of November* last, and to do further and receive what our said court shall have considered in this behalf. And this you may in no wise omit, under the penalty of one hundred pounds, and have there this writ. Witness ourself, at *Westminster*, the *20th day of January* in the *23d year* of our reign.

Courtenay and Courtenay.

Indorsed by the court.

Label, *William Stiles* to appear in Chancery, returnable the *24th of January*, to shew cause against a decree dated the *16th of November, 1783.* at the suit of *Geoffrey Stradling.*

Courtenay and Courtenay.

This *subpœna* being regularly served, an affidavit of service thereof should be made and filed, and an office-copy taken to be read in court. The solicitor then instructs counsel to move to make the decree absolute; but previous thereto, in the morning of the day for shewing cause, and on which the motion is to be made to make the decree absolute, the solicitor applies to the register for his certificate,

certificate,

scate, who thereupon certifies in writing (indorsed upon the decree) "There is not any order entered with the register, whereby cause is shewn to the contrary hereof to the 29th day of January," (the day on which the motion is made.) Upon the affidavit of service of the *subpæna*, and this certificate, the motion is made of course to make the decree absolute, which is ordered accordingly.

There seems to be no prefixt time for the service of this *subpæna*, nor how many days notice the defendant is to have between the day of service, and the day to shew cause; it seems by the course of the court, the defendant is to have eight days exclusive of the day of service to shew cause; either by serving the writ eight days before the return-day, or by serving the *subpæna*, so that the defendant may have eight days from the day of service; and as the motion for making the decree absolute, can only be in term time or on a seal-day, the service of the *subpæna* should be adapted thereto. And therefore it should seem that the return-day (if the *subpæna* be previously served eight days) or the eighth day exclusive of the day of service, is the regular day to move to make the decree absolute, and attention should be had, that the register's certificate be dated that day. The order for making the decree absolute being drawn up, passed and entered, at the register-office, and served upon the adverse clerk in court, the matters directed by the decree to be enquired into, or carried into execution, &c. are to be proceeded upon as in ordinary cases.

If a defendant means to shew cause against a decree on default, being made absolute; as soon as he is served with the *subpæna* to shew cause, an application should be made by petition to the Lord Chancellor, or Master of the Rolls before whom the cause was set down, stating the default of the defendant and praying, that upon payment of the costs of the petitioner's default in not attending the hearing, the cause may be restored to the paper of causes, and set down to be heard next after the causes already appointed to be

heard, which will be ordered of course. The petition answered, being left at the register-office, and the order thereon drawn up, passed, and entered at the same office, and a copy thereof served upon the adverse clerk in court personally, or left with his agent at his seat in the Six-clerk's office, shewing at the time of service, the original order passed, and entered; a bill of costs pursuant to the order should be demanded at the same time, and if upon taxation thereof, the clerks in court on each side differ, the decree must be taken to the Master's office, to whom the cause is referred, and the bill of costs left there, taking out a warrant on leaving the same, and at the return thereof another warrant to proceed thereon, and if the adverse party do not attend, a third warrant to proceed on the bill of costs. And if no attendance is given by the adverse party, the Master proceeds *ex parte*, but before that be done, the person serving the warrants must make oath of the due service of each warrant upon the adverse clerk in like manner as the order to set down the cause is served.

The costs pursuant to the taxation being paid or tendered to the adverse clerk in court, and a certificate or receipt from him, that the same are paid, or an affidavit made and filed of a tender or refusal thereof*; the defendant applies to the register with the order for restoring the cause, accompanied with a certificate or receipt of the taxed costs being paid, or an affidavit as before mentioned, and the register sets down, the cause to be heard next after the causes then appointed to be heard. The register will not set down the cause without seeing the receipt or affidavit of tender or refusal of the costs, and unless the cause be set down, it seems, the register will, at the instance of the plaintiff, certify there is no order whereby cause is shewn to the contrary of the decree, the order being considered of itself to be no stay of proceedings.

* Ord. Canc. 112.

A decree *nisi* against an infant is drawn up, passed, entered and acted under, and in many respects is considered, as an absolute decree; for the court having given judgment upon the merits, if when the infant arrives at age, he cannot shew good cause to the contrary, it is an absolute decree *ab initio* *. In a decree of foreclosure, though an infant has a day to shew cause against the decree after he comes of age, yet he is not when he comes of age to ravel into the account, nor is he so much as intitled to redeem the mortgage by paying what is reported due, but is only intitled to shew an error in the decree †; and unless there is new matter, fraud, or collusion, an infant is bound by a decree made for his benefit; so likewise his executor if he dies ‡.

An infant may controvert a decree before it is made absolute two ways; in case of fraud or collusion between the plaintiff and his guardian by an original bill §, in which it will be enough for him, to say the decree was obtained by fraud and collusion, or that no day was given him to shew cause against it ||, or if matter that appeared at the hearing was not insisted on, the infant may amend his answer put in whilst an infant, if he has a day given him by the decree to shew cause when he comes of age, (and without it the decree is erroneous) or he may put in a new answer upon motion or petition of course alléging his right was not fully set forth, or his interest not con-

* Mos. 203.

† 3 Wms. 352. *in notis*, this was admitted by the counsel on both sides, and also by the court to be the settled practice.

‡ 1 Atk. 631.

§ Mos. 203. 308.

|| In case of an erroneous decree against an infant Mr. *Vernon* used always to advise the bringing of an original bill to set it aside, but in such bill to alledge specially the errors in the former decree. 1 Wms. 737.

sulted in the former answer *. If new matter be discovered since the infant's answer was put in, a bill of discovery may be filed, and the time of six months by the course of the court allowed for a defendant to shew cause why a decree should not be made absolute after he comes of age, is not so sacred, but that in particular cases, and where the matter is of consequence, and it seems probable a material discovery will arise out of the defendant's answer, from whence the infant may amend his own answer, and make a better defence, the court upon the particular circumstances of the case, after the six months are expired has enlarged the time for three months *nisi*, and upon an insufficient answer, the time has been enlarged, *quousque* a full answer came in. And it is a good cause why a decree should not be made absolute, against an infant who has attained twenty-one, that he has put in a new answer, and the plaintiff must proceed upon the answer according to the rules of the court, as in other cases †.

The decree against an infant, directing the service of process to shew cause when he arrives at twenty-one; a *subpœna* to shew cause must be obtained as before directed, and served upon the defendant (*olim infans*) in the usual manner, and upon affidavit and certificate, the decree may be made absolute, by motion of course, in like manner as a decree by default of appearance.

Who are bound by the Decree.

All parties, and privies are bound by the decree, so is a purchaser after the decree, and a purchaser *pendente lite* ‡.

* Mos. 67. 1 Wms. 504. 2 Atk. 531. 2 Wms. 403.

† Mos. 313. The consequence of an infant putting in a new answer is, that he may examine witnesses a-new to prove his defence, which may be different from what it was before. 2 Wms. 403.

‡ Ch. Ca. 152. 231. 1 Vern. 459.

A decree for a foreclosure of a redemption against tenant in tail binds his issue *, and the remainder-man, who claims by a voluntary settlement of the tenant in tail, although no party to the decree †. If a person, present at the pronouncing of a decree, pays money to an executor contrary to the decree ; though he was no party to the suit, nor served with an order for the non-payment, he shall be bound by the decree ‡.

Where four parishioners are named to defend for all, and there is a decree against them ; another parishioner not party or privy to those four defendants, shall be bound by the decree §.

If the lord of a manor is decreed to admit copyholders upon a fine certain ; a copyholder, not a party, shall take advantage of the decree.

Who are not bound by the Decree.

A purchaser *bonâ fide*, before the bill exhibited, not being a party by the bill nor by the order, shall not be bound by the decree, nor any one who does not appear *gratis*, nor was served with process to hear judgment * *.

Nor any one, who has an interest, and is not party or privy † †.

Copyholders in fee, or freeholders for life, not parties, are not bound by a decree against the Lord of the manor ‡ ‡.

If one defendant is in contempt to a sequestration, and a decree is made against other defendants ; that does not bind the defendant in contempt, but he may afterwards appear and answer, and have the cause heard § §.

* Ch. Ca. 220.

† 1 Vern. 57. 123.

‡ Ch. Ca. 272. 282.

§ Hard. 169.

* * Prac. Reg. 125.

† † Ch. Ca. 48.

‡ ‡ 2 Atk. 515.

§ § 1 Vern. 228.

A decree in Chancery does not bind the right, but only the person *.

Signing and inrolling Decrees.

Until the decretal order is drawn up, signed, and inrolled, it has the force only of an interlocutory order, and is not final, but may be altered upon a rehearing, or it should seem, if the decree has not been acted under, it might be altered, upon motion or petition †.

The decree regularly drawn up, passed and entered, with the register, if not inrolled within the time prescribed by the rules and orders of court †, an application must be made by motion or petition, to inroll the decree *nunc pro tunc*, which the court will order as of course; this order has a retrospective energy, to the time of pronouncing the decree. The order being drawn up, passed and entered, at the register office in the usual manner, is to be left with the clerk in court, for the party inrolling the decree. The clerk in court draws up the form of the decree for inrollment, reciting therein all the pleadings, orders, and material proceedings in the cause, and for this purpose the solicitor leaves all the necessary proceedings requiring inrollment, with his clerk in court. The several proceedings in the suit being put into proper order, form and language, is to be ingrossed upon treble fix-penny stampd brief-paper; this is called the *dockett*.

The next procedure is, to present the docket to be signed by the Lord Chancellor, or Master of the Rolls, or

* Ch. Ca. 301.

† Prac. Reg. 123.

‡ All decrees and depositions pronounced upon hearing the cause in this court, are to be drawn, signed and inrolled, before the first day after the next *Michaelmas* or *Easter* term, after the same shall be so pronounced respectively, and not at any time after without special leave of the court. *Ord. Canc.* 116.

both

both of them, if the latter made the decree. But previous thereto, the Six-clerk for the party inrolling the decree, must, by himself or his deputy, examine * the dockett, with the several records, orders of court, &c. therein mentioned; and of his having so done, a memorandum in the nature of a certificate, is written at the foot of the last sheet of the dockett, and signed by the Six-clerk or his deputy (*the party examining*) purporting that the dockett agrees with the records, orders of court, reports, &c. (*the several proceedings therein recited,*) and is examined by the Six-clerk, or his deputy. The dockett authenticated by the proper officer, is left by the clerk in court, with the bag-bearer of the Six-clerk's office, and he leaves the same with the Lord Chancellor's secretary of decrees and injunctions to be signed by his lordship. If the decree be made by the Master of the Rolls, previous to the signing by the Lord Chancellor, the signature of his Honour must be procured, and for this purpose the bag-bearer leaves the dockett with his Honour's secretary of decrees and injunctions to be signed by the Master of the Rolls; which being done, the last and final requisite must be obtained, the signature of the Lord Chancellor: for whether the cause was heard before his lordship, or any of the judges sitting for him, or before the Master of the Rolls; whoever may have heard the cause, it is the Chancellor's decree and must be signed by him, before it is inrolled †. The bag-bearer leaves the dockett with the Lord Chancellor's secretary of decrees, &c. and the dockett is presented by him to be signed by his lordship as of course. The day of the month and year when the dockett was signed is written at the foot of the dockett near the signature of the Lord Chancellor; the

* No decree or dismission shall be presented to the Lord Chancellor, or Master of the Rolls, to be signed, until it be signed by the Six-clerk in the cause, or his deputy. *Ord. Canc.* 117.

† 3 Geo. 2. c. 30. *Ord. Canc.* 41.

dockett being thus signed, the clerk in court inrolling the decree, ingrosses an exact copy thereof upon parchment-rolls, and carefully examines them with the dockett, which together with the parchment-rolls is carried by the clerk in court into the record-room of the Six-clerk's-office, and deposited with the record-keeper for safe custody. The inrollment is thus compleat, and a decree thus inrolled is pleadable, nor can it be reversed but by appeal to the House of Lords, within five years, or by bill of review brought within twenty years, from the pronouncing of the decree*.

To prevent the inconvenience of quick signing decrees for inrolment, the court permits,

A Caveat

To be entered, which will prevent the signing of a decree previous to its inrollment for 28 days, to be accounted from the time of the decree being presented to the Great Seal to be signed, and notice thereof given by the secretary to the clerk in court of the other side †.

The *caveat* is entered with the Lord Chancellor's, or his Honour's secretary of decrees, &c. by leaving a note in the following form, with the bag-bearer of the Six-clerk's office.

In Chancery.

Between *Geoffrey Stradling* plaintiff.

William Stiles defendant.

Decree made by his Honour dated the 31st
day of *January* 1785.

Enter a *caveat* against inrolling this decree.

Birch Clerk.

28th *Sept.* 1785.

* 1 Brown. Parl. Ca. 95.

† 1 Wms. 610.

The court will vacate the inrollment of a decree, though strictly regular, if it is extremely quick, and it appears the other party intended to enter a *caveat*, but came too late by mistaking the place. Thus courts of law set aside judgments, as on surprize, though strictly regular. 1 *Vez.* 326.

Words of course used in the Inrollment of a Decree made upon Bill and Answer, the Defendant making default at the Hearing.

Whereas heretofore, that is to say, in or about *Hilary* term, which was in the year of our Lord, 1784. *Geoffrey Stradling* gentleman, exhibited his bill of complaint into this honourable court of Chancery, against *William Stiles*. Thereby setting forth that, &c. And further setting forth, &c. (*the bill briefly stated.*) And to be further and otherwise relieved in the premisses, the said complainant prayed the aid of this honourable court; and that the usual process of *subpœna* might be thereout awarded against the said defendant *William Stiles*, to compel him to appear to, and answer the said bill; which being granted, and the said defendant duly served therewith, he appeared, and answered accordingly.

Before the Answer.

And the said *William Stiles*, by his answer said, &c. (*the answer set out, omitting the schedule and words of course concluding the answer,*) and denied all unlawful combination and confederacy, and concluded his answer with the general traverse, as by the said bill and answer, remaining as of record in this honourable court may more fully appear,

Before the Order on Hearing.

And the said cause being thus ready for an hearing on the bill and answer, a day was by this court appointed, for the hearing thereof, on which day, being *Friday*, the third day

day of *August*, 1784. the said cause came on to be heard, before his Honour the Master of the Rolls, in the presence of counsel learned for the complainant, no one appearing for the defendant, although he was duly served with a *subpœna* to hear judgment, as by affidavit then produced, and read, appeared. Whereupon, and upon hearing the defendant's answer, and what was alledged by the counsel for the complainant. His Honour did order and decree, &c. (*the decretal orders.*)

Words preceding the Order to confirm the Report, Nisi.

And whereas on *Thursday* the 18th day of *January* 1785. upon motion that day made unto this court by the complainant's counsel. (*The order set out verbatim.*)

Words preceding the Order to confirm the Report absolute.

And whereas on *Friday*, the 28th day of *January* 1785. upon motion that day made unto this court, by the complainant's counsel, and upon allegations, that the defendant *William Stiles* had been duly served with the said order of the 18th day of *January* then last, as by affidavit appeared, and that no cause had been shewn to the contrary thereof, as by the register's certificate, also appeared. It was prayed that the said order might be made absolute, which was ordered accordingly.

Words preceding the Order to make the Decree absolute.

And whereas on *Thursday* the 10th day of *November*, 1784. upon motion made unto this court by the complainant's counsel, and upon allegation that the defendant had been served with a *subpœna* to shew cause against the said decree, as by affidavit appeared, and no cause had been shewn to the contrary thereof, as by the register's
certificate

certificate appeared. It was prayed that the said decree might be made absolute, as against the said defendant which was ordered accordingly.

Words preceding a Master's Report.

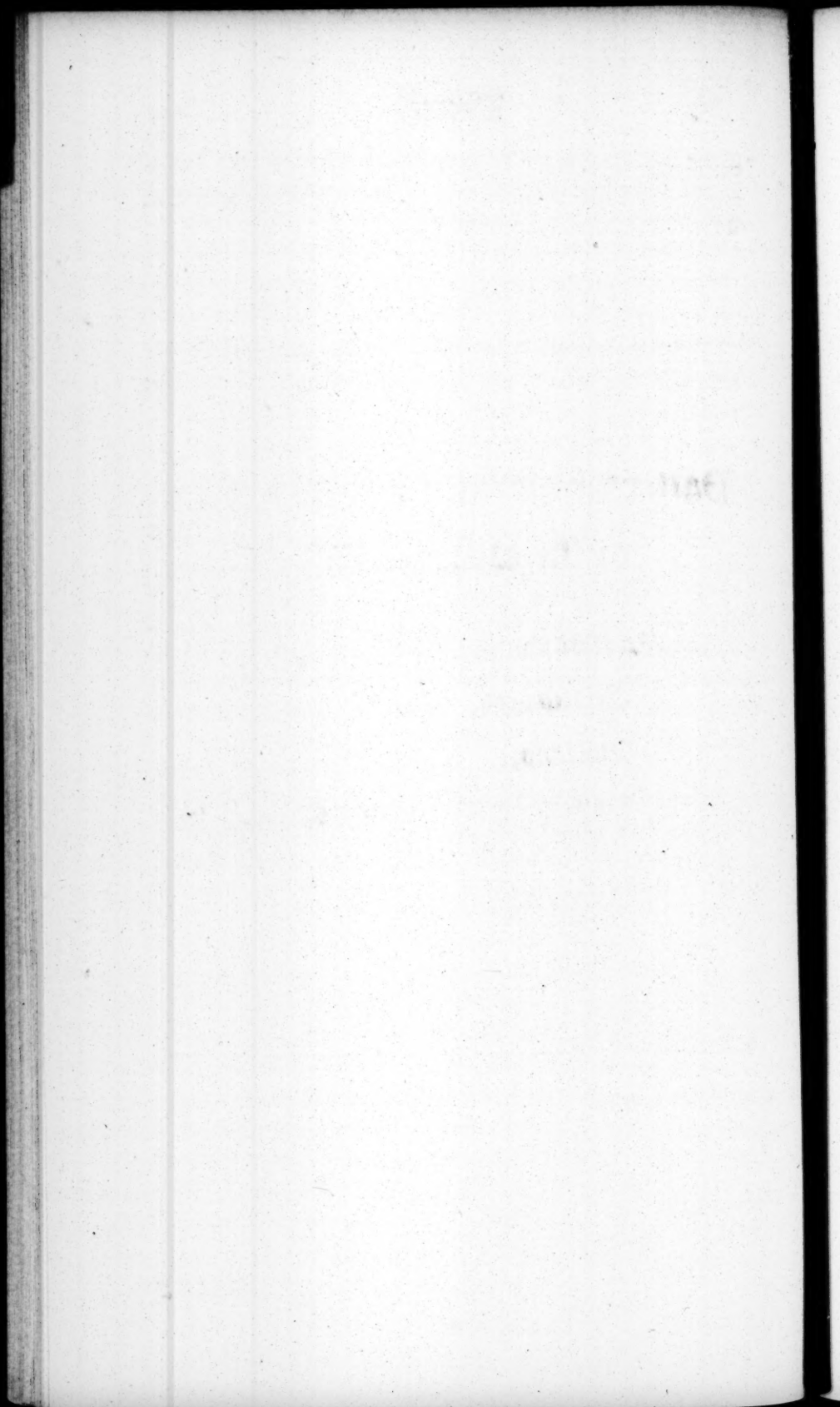
And whereas the said Mr. Ord afterwards made his report in the words and figures following (*report set out verbatim.*)

The Conclusion of the Decree.

And therefore, it is this present day, that is to say, *Thursday* the 29th day of *January*, in the 24th year of the reign of his Majesty king *George* the Third, and in the year of our Lord 1785. By the right honourable *Edward* Lord *Thurlow* Lord high Chancellor of *Great Britain*, and by the high and honourable court of Chancery, and by the power and authority of the said court ordered, adjudged and decreed that, &c.

This agrees with the records, orders of court, and report, and is examined by *Nehemiah Winter*,
for plaintiff.

12th March, 1785.
Thurlow C.
Ll. Kenyon.



**Matters incidental to every Suit
in the Progress of it.**

As Affidavits,

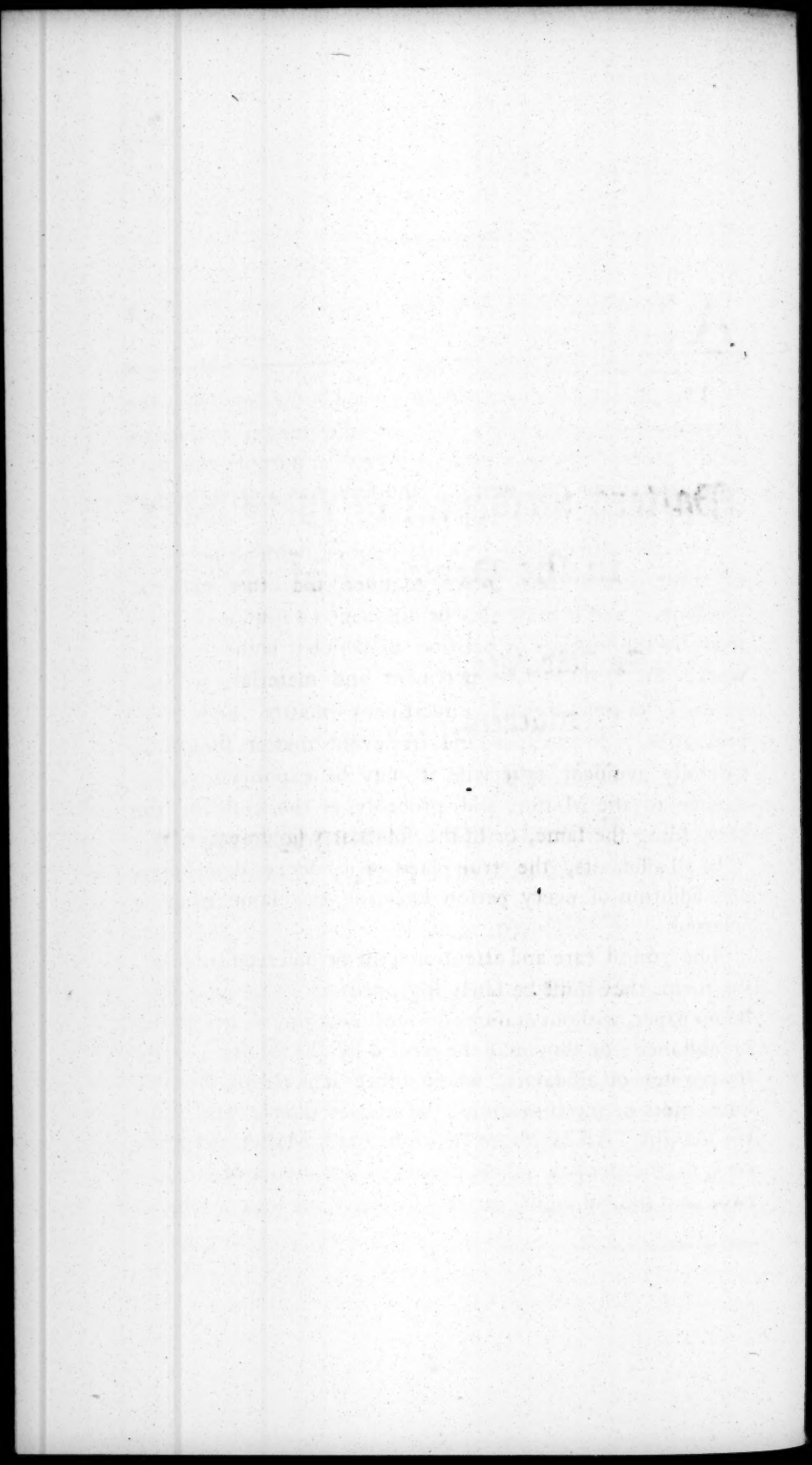
Certificates,

Motions,

**Paying, and receiving Money, in,
and out of Court,**

Petitions.

Writs.



Affidavits.

AN affidavit is a declaration upon oath before some person having competent and lawful power and authority to administer the same.

The affidavits here treated of, are used for certifying the service of process, orders, &c. or other matter incidental to the proceedings in a cause. For this purpose the affidavit is reduced into writing, and serves as a deposition to the fact therein stated and sworn to.

The affidavit must be true in substance, with all necessary circumstances of time, place, manner, and other material incidents; and it must also be sufficient to sustain the case made by the motion or petition of which it is the groundwork. So it should be pertinent and material, without needless tautology and impertinent matter and other prolixities. Scandalous and irrelevant matter should be carefully avoided, otherwise it may be expunged by reference to the Master, and probably at the costs of the party filing the same, or of the solicitor who drew it*.

In all affidavits, the true place of residence, description and addition of every person swearing the same must be inserted.

The utmost care and attention must be observed in drawing them, they must be fairly ingrossed on treble six-penny stamp paper, without erasures or interlineations of any words of substance; or they may be refused by the Master, or by the register of affidavits, whose office it is to file them†. Small blots or interlineations, the Master usually marks in the margin. Affidavits are sworn before a Master in Chancery, at the publick office, between the hours of ten and two, and six and eight, or at chambers, or at a Master's

* 1 Atk. 139.

† Ord. Canc. 75.

house. In the country they are sworn before a Master extraordinary; but in the latter case, the place where the affidavit is sworn, must be twenty miles from *London*, and such Master, at the foot of the affidavit, must express the name of the town and county where taken, or it will not be filed*. The party swearing the affidavit, must subscribe his christian and surname on the left hand thereof; the *jurat* is written on the right. Swearing an affidavit in a cause is one shilling, if no suit subsisting 1s. 6d.

Affidavits made to ground a motion, must be filed time enough before such motion, to enable the adverse party to take a copy, or the motion or petition which the affidavit is to support, must stand over. And all affidavits before they are read in court, or used to ground any orders, writs, process, or other proceedings, must be filed at the affidavit-office, and attested by an office-copy thereof under the hand of the register, or his deputy. Or for expedition, the copy upon treble six-penny stamp paper, may be made and carried to the affidavit-office, which the deputy will mark, and file the original. And till the original is filed, the registers, sworn clerks in Chancery, or other officers of the court should not make out, pass, or enter any orders, or issue any attachments or other process founded upon such affidavits. But all affidavits belonging to the *Supplicavit* office, and the petty bag-office, and also those touching lunatics and bankrupts are to be filed in the several offices where such matters are transacted.

In an affidavit of notice, 'tis not enough to say that notice was given, or the copy delivered to the party's clerk in court; but his name must also be expressly mentioned, that it may appear with certainty to whom notice was given; and it must say notice in writing, or words to that effect. And if he who serves the notice, does not know that the person on whom it is served, is the party's clerk in court, he must

* Ord. Canc. 121.

say, as he is credibly informed, and verily believes ; first taking care that he receives information accordingly. But if a notice be left at the clerk in court's seat, with his agent or clerk, such agent or clerk need not be named*.

Pauper affidavits after admittance are not to be ingrossed on stamp.

Where any motion or petition is grounded upon an affidavit of having material witnesses to examine in a cause whereby to gain longer time, the affidavit must contain the names of such witnesses, who the party is advised, are very material witnesses to be examined for him in the cause, and without whose testimony he is advised, he cannot safely proceed to the hearing of the cause, to the end that the court may judge of them, and prevent all unnecessary delays. *Sed vide*, 1 *Vern.* 334. where 'tis said not to be sufficient in an affidavit to say, such a one is a material witness, and beyond sea, without mentioning the point to which he can materially depose. It is necessary that every affidavit of the service of process, or of orders, do truly and fully prove a good service ; and if the plaintiff's name, the court, the return of the writ, or any thing material be omitted, no attachment can thereupon be regularly issued, for want of an appearance : for until a due service be shewn, no contempt appears to the court.

'Tis sufficient to file an affidavit any time before, or the day an attachment is made out, but not afterwards ; *sed vid.* 1 *Vern.* 172. where 'tis laid down as regular, if filed before the return of the attachment.

* *Prac. Reg.* 5.

Affidavit that the Plaintiff hath not the Deeds inquired after, to annex to a Bill of Discovery, before it be filed.

Between *A. B.* Plaintiff.
C. D. Defendant.

A. B. the plaintiff in this cause maketh oath, that he this deponent hath not, nor to the best of his knowledge, remembrance or belief, ever had, all or any of the deeds, evidences and writings relating to the estate in question in this cause, and which are mentioned in this deponent's bill exhibited in this honourable court against the said defendant; nor doth this deponent know where the said deeds, evidences and writings, or any of them now are, unless they be in the custody or power of the said defendant.

A. B. Sworn, &c.

Affidavit to be made by the Complainant on bringing a Bill of Interpleader.

Between *A. B.* Plaintiff.
C. D. and *E. F.* Defendants.

A. B. the complainant maketh oath, that this bill is not exhibited by the consent, knowledge or collusion of either of the defendants in the bill mentioned, but merely of his own free will for relief in this honourable court.

A. B. Sworn, &c.

Affidavit that the Plaintiff had Writings, but hath lost them, proper to be annexed to a Bill.

Between *A. B.* Complainant.
C. D. E. F. G. H. } Defendants.
and *I. K.*

A. B. the plaintiff maketh oath, that some time since, to wit, on, &c. last, the writings now sued for in this cause, were

were in his this deponent's custody and possession ; but since the said time, he this deponent hath actually lost them : And this deponent further saith, that he doth not know where the said writings are, unless they are in the hands or custody of the said defendants, some or one of them, or else that the said writings, are now or late were in the custody of the said defendant *I. K.* as he is credibly informed and verily believes.

A. B.

Sworn, &c.

Affidavit for a Ne exeat Regno.

Between *A. B. &c.* Plaintiff.

In Chancery.

and

C. D. Defendant.

A. B. of in the county of gent. one of the complainants in this cause, maketh oath that the defendant *C. D.* is indebted as executrix of her late husband *E. D.* late of deceased, to him this deponent and his co-partners *I. H.* and *G. H.* in the sum of 145*l.* 14*s.* 10*d.* for goods sold and delivered. And this deponent further saith that the said *C. D.* as executrix as aforesaid, is justly and truly indebted unto him this deponent, and the other complainants in the sum of 192*l.* 10*s.* 2*d.* for money paid to and for the use of the said *E. D.* her late husband, deceased. And this defendant further saith, that the said *C. D.* is indebted to him this deponent, and the said complainants his co-partners in the sum of 58*l.* 12*s.* 6*d.* for goods sold, and delivered, and work and labour done since the death of the said *E. D.* her late husband deceased. And this deponent further saith, that the said *C. D.* has received effects of her said late husband, to the amount of 2000*l.* and upwards, as he this deponent hath been credibly informed, and verily believes. And that it is generally

reported, and this deponent believes the same to be true, that the said *C. D.* hath taken her passage on board a merchant ship, bound for *New York* in *North America*, and is going to live and reside in parts beyond the seas, to avoid payment of her own debts, and the debts of her late husband. And that in case the said defendant *C. D.* goes abroad, beyond the seas, this deponent and his co-partners will be in great danger of losing their said debts due from her and her said late husband. And this deponent further saith, that he is advised, the said defendant being executrix of her said late husband cannot be held to bail at law. And that he and his co-partners, the said other complainants are remediless, unless by the process of this honourable court.

A. B.

Sworn, &c.

The like

Between *A. B.* Complainant,
C. D. Defendant,

A. B. the said complainant maketh oath that *C. D.* the defendant oweth and now is justly indebted unto him this deponent in the sum, &c. and being thus indebted, the said *C. D.* hath lately threatened, and given out, that he will speedily leave this kingdom, and go beyond sea, whereby this deponent will either lose his said debt, or the same will be very much endangered, and it will be difficult for this deponent to recover the same.

A. B.

Sworn, &c.

Affidavit of Waste being committed

Between *A. B.* Plaintiff.
C D. Defendant.

A. B. the complainant maketh oath, that *C. D.* the defendant in this cause, on, &c. last past, did pull down
and

and destroy part of the house and out-houses, at, &c. to which he this deponent hath lawful title, being seized in fee of the said estate and premises in question, as this deponent is advised and believes, and for which he is now prosecuting the defendant. And that the said *C. D.* did also fell and cut down several timber trees upon the lands belonging to the same, and continues to commit other waste and spoil in and upon the said estate of this deponent, to his great loss and damage,

A. B.

Sworn, &c.

Affidavit of Poverty

Between *A. B.* Plaintiff.

C. D. Defendant,

A. B. the complainant (or *C. D.* the defendant) maketh oath, that he is not worth the sum of five pounds in all the world, his just debts being first paid, and his wearing apparel and the matters in question in this cause only excepted.

A. B.

Sworn, &c.

Affidavit to a Certificate of a Person's being of Age.

A. B. (son or daughter) of *A.* and *C. B.* was baptized.

The above is a true copy of the register, of (name the parish) witness my hand this day of 1784.

E. F. Clerk of the parish.

In Chancery.

Between, &c.

D. E. of, &c. maketh oath that the above mentioned extract signed by *E. F.* of the parish of

afore-
said,

relief in this honourable court. And this deponent further saith, that on the same day, he this deponent left the body of the said *subpœna* under the seal as aforesaid, for the said defendant *C. D.* at his late dwelling-house, and last place of settled residence, in *St. Martin's le Grand*, in the said city of *London*, (as this deponent hath been also credibly informed) by delivering the same to a woman, who said she then lived in the said house, and acquainted her with the contents thereof, by which said *subpœna* the said *C. D.* and *W. K.* were to appear in this honourable court, at the suit of the said plaintiff, and was returnable immediately.

S. S.

Sworn, &c.

Affidavit of Service of an Order Nisi, to make same absolute.

Between *A. B.* and *I. K.* Plaintiffs.

In Chancery.

C. D. and *L. R.* Defendants.

B. D. clerk to *Mr. H. K.* solicitor for the defendant *C. D.* in this cause, maketh oath, that he this deponent did (the time when) personally serve *Mr. F. D.* with an order of this honourable court, made in this cause (time when same was made) whereby it is ordered, that a report made in this cause by *Mr. Leeds*, one of the Masters of this court, bearing date the first day of *May* last, whereby *Mr. I. I.* on the behalf of the said *C. D.* is reported the best purchaser of the premises therein mentioned, at the sum of 2000*l.* and all the matters and things therein contained, do stand ratified and confirmed by the order, authority, and decree of this court, to be observed and performed by all parties thereto, according to the tenor and true meaning thereof, unless the parties concerned, who are many in number, and live remote from each other, their respective clerks in court having notice thereof, should, within eight days after such notice, shew unto this court good cause to the contrary, by delivering to the said *Mr. F. D.* a true copy of the said order,

order, and at the same time shewing him the said order, passed and entered. And this deponent further saith, that he did afterwards on the same day, personally serve Mr. G. with the said order, by delivering to the said Mr. G. a true copy of the said order, and at the same time shewing him the said order. And this deponent further saith, that he did afterwards on the same day, personally serve Mr. H. with the said order, by delivering to the said Mr. H. a true copy of the said order, and at the same time shewing him the said order; which said Mr. D. Mr. G. Mr. H. are all the clerks in court for the plaintiffs and defendants in this cause, as this deponent is informed and believes. And this deponent further saith that he did on the same day personally serve Mr. N. who by a former report had been reported the best purchaser of the said premises, with the said order, by delivering to the said Mr. N. a true copy thereof, and at the same time shewing him the said original order, passed and entered*.

B. D.

Sworn, &c.

Affidavit of Residence of Defendant to obtain Subpoena returnable immediately.

In Chancery.

Between R. H. Plaintiff.

I. G. Defendant.

D. D. clerk to K. K. of Castle-yard Holborn, in the county of *Middlesex* gentleman, maketh oath, that the defendant I. G. liveth in *Great George-street*, within the city of *Westminster*, or the suburbs of the city of *London*, in the county of *Middlesex*. And this deponent, this present day, enquired at the said defendant's house, or lodgings in the

* An order *nisi* requires *personal* service, unless the court substitutes a service upon the clerk in court upon a suggestion that the defendants are many in number, and live remote from each other.

said

said street, whether he the said defendant was in town or not; and this deponent was there informed by a person (in livery) at the said defendant's house or lodgings, that he was then within, in his said house or lodgings.

D. D.

Sworn, &c.

N. B. If the defendant does not live in *London*, or the suburbs thereof, the place where, must be stated in the affidavit, and how many miles it is distant from *London*.

Affidavit of Service of Subpœna from Defendant's own Confession.

In Chancery.

Between *R. R.* Plaintiff.

S. T. Defendant:

R. R. of, &c. the complainant in this cause, maketh oath, that on (the time when) at (the place where) he heard *S. T.* the defendant in this cause, own and confess to *Mr. T. C.* (the person to whom he made such confession) that he the said defendant was served with a writ of *subpœna*, issuing out of, and under, the seal of this honourable court, returnable (the return of writ) at the suit of this deponent.

R. R.

Sworn, &c.

Affidavit of Service of Subpœna.

Between *A. D.* Plaintiff.

In Chancery.

and

C. D. Defendant:

A. B. of, &c. maketh oath, and saith, that he did, on the day of deliver to, and leave with, the defendant *C. D.* a label of a *subpœna*, which appeared to this deponent to be issued out of, and under

under the seal of, this honourable court. And this deponent did at the same time shew to the said defendant (C. D.) the body of the said *subpæna*, so under seal as aforesaid. And this deponent further saith, that he did on the day of deliver to and leave with the said defendant (E. F.) the body of the said *subpæna* so under seal as aforesaid.

Or else,

A. B. of, &c. maketh oath and saith, that he did, on the day of deliver to, and leave with (a man, woman) at the house or lodging of the said defendant (C. D.) in street, &c. who informed this deponent, that (he, or she) was the (servant, wife, daughter, son) of the said defendant, the body of the said *subpæna* so under seal as aforesaid.

Or else, as the Case is,

And this deponent did (on the same day, or on the day of) deliver to, and leave with (E. F.) who informed this deponent (he or she) was the master, or mistress of the house where the said defendant (G. H.) lodged, at (his or her) house in

Or else, as the Case is,

did deliver to, and leave with a person, at the house of E. F. situate at who informed this deponent (he or she) was (a servant, or son, or daughter) of the said E. F. and that the said defendant G. H. lodged at the said house, the body of the said *subpæna* so under seal as aforesaid, by which said *subpæna* the said defendant was commanded to appear in this honourable court, on the day of

(to hear judgment on the day of if it is so) at the suit of the above named plaintiffs, as appeared to this deponent by the label of the said *subpæna*.

A. B.

Sworn, &c.

Affidavit

Affidavit to obtain an Order of Court, that Service of Subpœna to hear Judgment on Defendant's Solicitor, shall be good Service.

In Chancery.

Between T. C. Plaintiff.

A. B. Defendant.

C. B. of, &c. gentleman, maketh oath, that he this deponent, the 17th day of *May* instant, went to Mr. G. H. who is solicitor for the defendant in this cause, to inquire where he could find the defendant A. B. in order to serve him with a *subpœna* to hear judgment in this cause, which this deponent then had in his pocket ready to serve, and the said Mr. P. P. told this deponent that he believed the said A. B. was in *Scotland*, but immediately afterwards returned for answer, that he knew not where he was. And this deponent the same day went to the *Crown* and *Anchor* tavern, in the *Strand*, (which place this deponent was informed was a house where the said A. B. used frequently to come,) and the master of the said tavern told this deponent that he did not know where the said A. B. was, or was to be met with. And this deponent saith, that he, on the same day, went to a public house, called the *Flying Horse*, in *Bartholomew Lane*, in the city of *London*, another place where this deponent was likewise informed the said defendant A. B. used frequently to come; and the master of the house likewise informed this deponent, that he knew not where the said defendant A. B. was, but believed he was very hard to be met with; and a gentleman being then in the said *Flying Horse*, told this deponent, that he knew the defendant A. B. very well, and that he was not then in *Great Britain*.

C. B.

Sworn, &c.

Affidavit

Affidavit of Plaintiff, that he saw another Person serve Defendant with a Subpœna at his Suit.

In Chancery.

Between R. R. Complainant,
S. T. Defendant.

R. R. of, &c. the complainant in this cause, maketh oath, that on (the time when *subpœna* served on defendant) he saw P. R. of, &c. serve the defendant S. T. with a writ of *subpœna*, issuing out of and under the seal of this honourable court, whereby the said defendant S. T. was required to appear in the said court, on (the return of the writ of *subpœna*) at the suit of this deponent, and that since the service thereof, the said P. R. is dead, or has absconded, so that he cannot now be found or met with.

Affidavit of seeing a Person, serve a Subpœna, when the Person who served it is dead or absconds.

Between A. B. Plaintiff.
E. F. Defendant.

A. B. of

in the county of

maketh oath, that he this deponent was present on the day of and did see C. D. of, &c. personally serve E. F. the defendant in this cause, with a *subpœna* issuing out of and under the seal of this honourable court, by delivering unto the said E. F. the body of the said *subpœna*, so under seal as aforesaid; by which said *subpœna* the said E. F. was commanded to appear in this honourable court the day of at the suit of the above named plaintiff. And this deponent further saith, that he this deponent hath diligently and strictly inquired after the said C. D. in order that he might prove the service of the said *subpœna*, but this deponent hath not been

been able to get any other intelligence of him, but that he is either dead, or absconds, so that he cannot be found.

A. B.

Sworn, &c.

Affidavit that a Defendant absconds to avoid being served with a Subpcena.

Between *A. B.* Plaintiff.

C. D. Defendant.

A. B. the plaintiff in this cause maketh oath, that on strict search and diligent enquiry at the usual place of residence of the defendant *C. D.* and elsewhere, he cannot be found to be served with a *subpcena* issuing out of, and under seal of this honourable court, returnable, &c. at this deponent's suit: And this deponent further saith, that he was informed by Mr. *E. F.* of which information this deponent verily believes to be true; and he justly suspects, that he the said defendant *C. D.* is gone beyond sea, or now absconds, on purpose to avoid being served with the aforesaid process; and saith, that the said *C. D.* hath not entered any appearance in this cause.

A. B.

Sworn, &c.

Affidavit of serving a Subpcena for a better Answer.

A. B. &c. [as in affidavit of serving a *subpcena* to answer] by which said *subpcena* the said defendant *C. D.* was commanded to appear in this honourable court to put in a better answer to the plaintiff's bill, as appeared to this deponent by the label of the said *subpcena*.

A. B.

Sworn, &c.

Affidavit of serving a Subpœna for Costs, and Refusal to pay the same.

Between *E. F.* Complainant.
C. D. Defendant.

A. B. &c. maketh oath, that this deponent did, on the
 day of personally serve the said defen-
 dant *C. D.* with a *subpœna* issuing out of, and under the seal
 of this honourable court, by delivering to the said *C. D.* the
 body of the said *subpœna* so under seal as aforesaid, by which
 said *subpœna* the said *C. D.* was required to pay unto the
 said plaintiff, or bearer, the sum of as
 appeared to this deponent, by the label of the said *subpœna*;
 and this deponent did, at the same time, demand of the said
C. D. the said sum of , but the said
C. D. then refused to pay the same, or any part thereof
 to this deponent, nor hath the said *C. D.* since paid the
 same, or any part thereof, either to this deponent, or to
 the said plaintiff, as this deponent is informed, and verily
 believes.

A. B.

Sworn, &c.

Affidavit of Service of a Subpœna to name an Attorney.

The form of this affidavit is the same as that of serving
 any other *subpœna*; only inserting at the last, “whereby the
 “said defendant was required to appear in this court the
 “ day of to name an attorney at the
 “plaintiff’s suit.”

Note, It is usual, if upon service of this writ, the defen-
 dant do not appear at the return thereof, to proceed by
 attachment against him, to compel him. When the clerk
 in court for the defendant dies, pending the suit, the plain-
 tiff serves the defendant with a *subpœna* to name an attorney.

But

But if the plaintiff's clerk in court dies before the decree, the defendant need not serve the plaintiff with a *subpœna*; because it is the plaintiff that must keep the cause moving; and the defendant can only give him notice to dismiss, if he does not proceed in three terms. And he is to serve this notice personally upon the plaintiff, which will oblige him to have recourse to a clerk in court; but after a decree, if there be an account before a Master, &c. and the plaintiff's clerk dies, then the defendant may serve him with a *subpœna* to name an attorney.

Affidavit that a Plaintiff cannot be found.

Between C. D. Plaintiff.

E. F. Defendant.

H. K. of, &c. solicitor for the defendant in this cause, maketh oath, that he, this deponent hath lately used his utmost endeavours to find out the said complainant, but after the most diligent enquiry this deponent cannot hear where he is, though this deponent enquired after him the said complainant, at, &c. where this deponent was informed he lived and resided. And this deponent further saith, that he hath applied to Mr. the said complainant's clerk in court, and to Mr. the said complainant's solicitor in this cause, to be informed by them, where the said complainant lived or might be found; but they both refused to give this deponent any information therein.

H. K.

Sworn, &c.

Affidavit that the Defendant cannot answer without Sight of Goods in the Country.

Between *A. B.* Plaintiff.

C. D. Defendant.

C. D. the defendant in this cause maketh oath, that this deponent cannot put in a full and perfect answer to the complainant's bill, without the sight of several goods and things mentioned in the plaintiff's said bill. And this deponent further saith, that the said goods and things are now at _____ in the county of _____ above _____ miles distant from the place of this deponent's now residence.

C. D.

Sworn, &c.

Note, If the bill be for a discovery of deeds and writings, then the affidavit must be thus, *viz.* That the defendant cannot put in a full and perfect answer, &c. without the sight and perusal, &c. (mentioning the deeds, &c.) and which deeds, &c. are at, &c.

Affidavit that a Defendant is sick and unable to answer.

Between *E. F.* Plaintiff.

C. D. Defendant.

A. B. of, &c. maketh oath, that this deponent hath attended *C. D.* the defendant in this cause for a week past as his physician, and saith, that during the aforesaid time, the said *C. D.* hath been, and now is, so ill and disordered in his senses, by means of a violent fever which he now labours under, that he is confined to his bed. And this deponent verily believes that the said *C. D.* is, by reason of such indisposition at this time utterly incapable of answering the plaintiff's bill.

Affidavit

Affidavit that a Defendant is unable to attend to put in his Answer.

Between *A. B.* Plaintiff.
C. D. Defendant.

E. F. of, &c. maketh oath, that the said defendant is so much afflicted with rheumatick pains, that he is confined to his bed, and is unable to attend, to put in his answer to the said complainant's bill in this cause.

E. F.

Sworn, &c.

Affidavit of a Witness being old and infirm, upon a Petition to examine him de bene esse before issue joined.

Between *A. B.* Plaintiff.
C. D. Defendant.

A. B. the plaintiff in this cause, maketh oath, that *G. H.* of, &c. gentleman, a very material witness on his behalf in this cause, and without whose evidence, this deponent, (as he is advised, and verily believes,) cannot safely proceed to a hearing in this cause, is now in the seventieth year of his age, as he the said *G. H.* informed this deponent. And this deponent further saith, that the said *G. H.* appears to be very weak and infirm, and in a declining way, and from his advanced years, in all probability not likely to live long.

A. B.

Sworn, &c.

*Affidavit of Service of a Subpœna to testify.*Between *A. B.* Plaintiff.*C. D.* Defendant.

G. H. of, &c. gentleman, maketh oath, that he this deponent did, on the day of personally serve Mr. *I. K.* with a *subpœna* issuing out of, and under seal of this honourable court, by delivering unto the said Mr. *I. K.* the body of the said *subpœna* under seal as aforesaid. And this deponent did at the same time give to the said Mr. *I. K.* one shilling, by which said *subpœna* the said Mr. *I. K.* was immediately to appear in this court, to testify for the plaintiff in this cause, as appeared to this deponent by the label of the said *subpœna*.

G. H.

Sworn, &c.

*An Affidavit of a Defendant, his Clerk in Court, and Solicitor, in order to enlarge Publication, the Commission being returned.*Between *A. B.* Plaintiff.*C. D.* Defendant.

The defendant *C. D.* of in the county of and *E. F.* the defendant's solicitor in this cause, and *G. B.* the said defendant's clerk in court in this cause, severally make oath, and say; And first the said defendant *C. D.* for himself saith, that the depositions taken in this cause, by virtue of a commission issued for that purpose, out of, and under seal of this honourable court, have not been seen, read, or heard read, by this deponent, nor hath this deponent been informed or acquainted with the purport or contents of the said depositions so taken, nor will this deponent, until publication shall be further enlarged and
pass

pass by the order of this honourable court, in case such order can be obtained. And the said defendant further saith, that he hath several material witnesses to examine, as he is informed, and believes (*to wit* .) And the said *E. F.* and *G. B.* for themselves severally say that the said depositions are returned, and now remain in the custody of this deponent *G. B.* the said defendant's clerk in court, unopened and unpublished, as these deponents severally believe : And further say, that they nor either of them have not seen, read, or heard read, the said depositions, nor been informed of the contents thereof, nor will they these deponents, or either of them, be informed of the contents thereof, until publication shall be further enlarged, and passed by the further order of this honourable court, in case such order can be obtained.

C. D. All sworn the day of
E. F. 1783. at the public office before
G. B.

Affidavit of a Clerk in Court, in order to enlarge Publication, the Commission being returned.

Between *C. D.* Complainant.
E. F. Defendant.

H. C. one of the sworn clerks of the Six-clerk's office, the said 's clerk in court, maketh oath, that the depositions taken in this cause, by virtue of a commission issued for that purpose out of, and under seal of this honourable court, are returned unto him this deponent, and the same remain unopened, and unpublished ; and this deponent saith, that he hath not seen, nor read, nor is he acquainted with the purport or contents of the depositions so taken, nor will this deponent be informed thereof until

publication shall pass by the further order of this honourable court, in case such order can be obtained.

Note, The plaintiff or defendant, and his solicitor, must make the like affidavit with the clerk in court, where publication is actually passed and witnesses examined, before any order can be obtained to enlarge publication.

Affidavit of a Solicitor, in order to enlarge publication, the Commission being returned.

Between C. D. Complainant.

E. F. Defendant.

A. B. of, &c. maketh oath, that he hath not seen, heard read, or been informed of the purport or contents of any of the depositions taken in this cause, nor will he, this deponent, see, hear read, or be informed of the purport or contents of the said depositions, until the further order of this honourable court, in case such order can be obtained for the said defendant to examine any witnesses.

Note, This affidavit is used where the clerk in court has made an affidavit as before; but then the plaintiff or defendant, at whose request publication is enlarged, must make the like affidavit; and if all three are in or near London, they usually join in one affidavit.

Note; an Affidavit of service of a *subpœna* to hear judgment, may be in the same form as a *subpœna* to appear.

Affidavit

*Affidavit of serving a Notice of Motion.*Between *A. B.* Complainant.*C. D.* Defendant.

S. S. of, &c. maketh oath, that he this deponent did, on the day of serve Mr. *R.* who is or acts as clerk in court for the defendant in this cause, (as this deponent is informed and believes) with a notice in writing in this cause, purporting that the plaintiff intended to move this court, &c. (here recite the notice) by delivering to and leaving a copy of the said notice, with the said Mr. *R.*'s clerk or agent at his seat in the Six-clerk's office.

S. S.

Sworn, &c.

*Affidavit of a Mortgagee's attending to receive his Money pursuant to the Master's Report.*Between *G. H.* Plaintiff.*C. D.* Defendant.

G. H. the plaintiff in this cause, maketh oath, and faith, that he, this deponent, in pursuance of the report of *S. T.* Esquire; one of the Masters of this honourable court, bearing date day of did personally attend and wait at the chapel of the Rolls in *Chancery-Lane*, from before the hour of ten of the clock, until and after the hour of twelve of the clock, (the time and place mentioned in the report) in the forenoon of the said day of in order to receive from the defendant in this cause, the sum of 544*l.* 7*s.* by the said report, reported due, and directed to be paid to this deponent for principal, interest, and costs, for the mortgage in question in this cause, when, and where the said defendant (if more than

than one "the said defendants, or any or either of them," or any other person or persons, on his, their (any or either of their) account or accounts, did not, to this deponent's knowledge or belief, attend or pay to this deponent the said sum of 544*l.* 7*s.* or any part thereof; but this deponent saith, that the said sum still remains due, and unsatisfied.

G. H.

Sworn, &c.

Affidavit of serving a Petition.

Between E. F. Plaintiff.

C. D. Defendant.

A. B. of, &c. maketh oath, that he this deponent did, on the day of instant, (if upon the party himself, then you say, "personally serve the (party) with a true copy, &c.") leave at the seat of Mr. B. of the Six-clerk's office, with his agent there, a true copy of a petition in this cause, in writing, preferred to the right honourable the Master of the Rolls, on the humble petition of the said defendant, with his Honour's answer, or order thereon, bearing date the instant, whereby it was ordered, that the parties concerned, should attend his Honour, on the matter of the said petition, the then next day of petitions, of which notice was forthwith to be given; which said Mr. acts as clerk in court, for the plaintiff in this cause, as this deponent is credibly informed, and verily believes. And this deponent further saith, that at the time he so served the said copy, he shewed the said original petition to the said agent.

A. B.

Sworn, &c.

Affidavit

Affidavit of serving an Order on a Clerk in Court.

Between *A. B.* Complainant.
C. D. Defendant.

H. K. of, &c. maketh oath, that he this deponent did
on the day of personally serve
Mr. with a true copy of an order made
in this cause, bearing date, &c. whereby it was ordered,
that, &c. (here set forth the ordering part) or to that
effect. And this deponent did at the same time, shew
unto the said Mr. the original order duly passed,
and entered; which said Mr. is clerk in court
for in this cause, as this deponent is
informed and believes.

H. K.

Sworn, &c.

*Affidavit of serving an order to confirm the Master's Report,
unless Cause.*

Between *A. B.* Plaintiff.
C. D. Defendant.

S. S. of, &c. maketh oath, that he this deponent, did,
on the day of personally serve the defen-
dant *C. D.* with an order made in this cause, bearing
date the day of whereby it was order-
ed that the report made in this cause, by Mr. *M.* one of
the Masters of this court, dated the day of
and all the matters and things therein contained, should
stand ratified and confirmed by the order, authority, and
decree of this honourable court, to be observed and per-
formed by all parties thereto, according to
the

the tenor and true meaning thereof, unless the defendant having notice thereof, should within eight days after such notice shew unto this court, good cause to the contrary, and at the same time shewed the said *C. D.* the said original order duly passed and entered.

S. S.

Sworn, &c.

Affidavit of serving an Order on two Clerks in Court.

Between *C. D.* Complainant.

E. F. Defendant.

T. H. of, &c. maketh oath, that he, this deponent, did, on the day of last, leave at the seat of Mr. of the Six-clerk's office, with his agent there, a true copy of an order in writing in this cause, duly passed and entered, bearing date the day of the said whereby it was ordered, that, &c. And this deponent further saith, that he did on the same day, also leave at Mr. 's seat, with his clerk or agent there, another copy of the said order in writing, purporting as aforesaid; which said Mr. is clerk in court for the, &c. and the said Mr. for the , as this deponent is credibly informed, and verily believes. And this deponent, at the same time, shewed each of the said respective agents, he so served as aforesaid, the said original order.

Affidavit of serving an Injunction.

Between *A. B.* Complainant.

C. D. Defendant.

G. H. of, &c. maketh oath, that he this deponent, did, on the day of last, personally serve the defendant in this cause, with a true copy of an injunction

in this cause issued out, and under the seal of this honourable court, bearing teste the day of instant (or now last past;) and this deponent did at the same time shew unto the said defendant, the original writ of injunction under seal of this honourable court, whereby the said defendant was enjoined, &c. [here set forth the enjoining part of the injunction, concluding with these words,] or to that effect.

G. H.

Sworn, &c.

Affidavit, where the Defendants live in different Counties, to obtain an Order, that Service of an Order to confirm a Master's Report Nisi, on the Clerk in Court, may be good Service.

Between A. B. Plaintiff.

C. D. E. F. and G. H. Defendants;

I. K. of, &c. maketh oath, that the said several defendants live or reside, at a great distance from each other, in several counties in *England*, to wit, the said C. D. at L. in the county of D. the said E. F. at T. in the county of Y. and the said G. H. at S. in the county of R. as this deponent is informed and verily believes.

Affidavit of producing all Deeds and Writings before a Master.

Between A. B. Plaintiff.

C. D. Defendant.

C. D. the defendant in this cause, maketh oath, that he, this deponent, or any other person or persons for his use, to his knowledge or belief, or with his privity or consent, have

have not, nor hath, nor ever had, in his or their custody, or power, any deeds, books of accounts, papers or writings whatsoever, relating to the matters in question in this cause, other than, and except the several deeds, books of account, papers, and writings mentioned and contained in the schedule hereunto annexed.

C. D.

Sworn, &c.

Affidavit of serving a Writ of Execution of a Decree, upon a Clerk in Court.

Between C. D. Complainant.

E. F. Defendant.

A. B. of, &c. maketh oath, that he, this deponent did, on the day of this instant deliver unto Mr. the defendant's clerk in court, a true copy of a writ of execution of a decree, bearing teste at *Westminster*, the day of and at the same time shewed him the said writ of execution, under seal of this honourable court, whereby the defendant was enjoined or directed to, &c.

A. B.

Sworn, &c.

Affidavit of serving a Writ of Execution of a Decree, &c. upon the Parties.

Between A. B. Complainant.

C. D. Defendant.

E. F. of, &c. maketh oath, that upon, &c. last, he this deponent, did personally serve the defendant with a writ of execution of a decree, made in this cause, bearing teste the day of last past, by shewing the said writ under seal of the said court, unto the
said

said defendant, at his house, in, &c. and at the same time delivering unto him a true copy thereof; by which decree and writ, the defendant was ordered to pay, &c. in the said decree, and writ mentioned; and at the same time, this deponent shewed unto the said defendant, a letter of attorney, executed by the complainant, under his hand and seal, empowering this deponent, to ask and receive, of the said defendant, the said sum of, &c. A copy of which said letter of attorney, this deponent then, also, left with the said defendant, of whom he did then demand the said sum of, &c. but the defendant did not then pay the same, or any part thereof, to this deponent, or to the plaintiffs, or to any other for his use, to this deponent's knowledge or belief.

E. F.

Sworn, &c.

Affidavit of having discovered new Matter for a Bill of Review.

Between A. B. Plaintiff.

C. D. Defendant.

C. D. the defendant maketh oath, that since the time of pronouncing the decree in this cause, he, this deponent, hath discovered new matter of consequence in the said cause, particularly that the plaintiff on, &c. did, &c. which the deponent could not possibly know, so as to make use thereof, in his defence, at the time of pronouncing the said decree.

C. D.

Sworn, &c.

Affidavit

Affidavit of waiting at the Rolls, to receive Money reported due.

Between *I. F.* Plaintiff.

I. C. C. R. and *W. G.* Defendants.

I. F. the plaintiff in the above cause maketh oath, that he did attend at the chapel of the Rolls, in *Chancery-Lane*, within the liberty thereof, and county of *Middlesex*, from the hour of ten of the clock in the forenoon of this 17th day of *April*, till after the hour of twelve of the clock at noon, of the same day, in order to receive the sum of reported due to this deponent, by the report of *E. M.* Esquire, made in this cause, the tenth day of *January* last; but this deponent saith, that the said defendants *I. C. C. R.* and *W. G.* or any, or either of them, or any person on their, or any or either of their behalfs, did not attend there; or pay, or offer to pay, the said sum of or any part thereof, to this deponent, neither is the said sum of money, or any part thereof, yet paid to this deponent.

I. F.

Sworn, &c.

Affidavit of Facts for further adjourning Cause.

Between *D. W.* Plaintiff.

C. M. his Wife } Defendants.
and others }

I. R. one of the solicitors of this honourable court, maketh oath, that he, this deponent, hath made diligent enquiry after the defendant *C. M.* and particularly of *O. P.* his solicitor, and *L. M.* his clerk in court in this cause, where the said *C. M.* could be heard of, or met with, so as to serve the said *C. M.* with a *subpœna*, to hear judgment in this

this cause, but neither the said *O. P.* or *L. M.* could or would inform this deponent, where the said *C. M.* could be found.

I. R.

Sworn, &c.

Affidavit of Defendant being served with Subpœna to hear Judgment, in order to dismiss the Bill with Costs, if the Plaintiff makes Default at the hearing of the Cause.

In Chancery.

Between *A. B.* Plaintiff.

and

C. D. Defendant.

C. D. the defendant above named, maketh oath and faith, that on the day of he, this deponent was served with a *subpœna* issuing out of, and under the seal of this honourable court, whereby this deponent was required to appear in this honourable court, to hear judgment, the day of at the suit of the complainant *A. B.*

C. D.

Sworn, &c.

Affidavit to ground an Application for a Commission to examine Witnesses abroad.

In Chancery.

Between *A. B.* Plaintiff.

and

C. D. Defendant.

A. B. of, &c. Esquire, the plaintiff above named, maketh oath, and faith, that this cause is now at issue, and this deponent is desirous of proceeding therein. And this deponent further faith, that he hath several material witnesses to examine, who now live, and reside, in *Charlestown*, in *South-Carolina*, in *North America*, as this deponent hath been informed, and verily believes: and particularly *John Edwards*, and *James Stiles*, who are subscribing witnesses, to

certain indentures of lease and release, in the pleadings in this cause mentioned. And this deponent saith, he is advised, he cannot safely proceed to a hearing in this cause, without the testimony of such witnesses.

A. B.

Sworn, &c.

Affidavit in support of a Charge, left at a Master's Office.

Between *A. B.* Defendant.

and

C. D. Plaintiff.

A. F. of, &c. widow and executrix of *I. F.* late of deceased, maketh oath, and saith, that *K. W.* late of Esquire, deceased, in the pleadings of this cause, named, was in his life-time, and at the time of his death, justly and truly indebted unto this deponent's said late husband, on bond bearing date the day of 1752. in the penal sum of 800*l.* conditioned for payment of the sum of 400*l.* of lawful money, with interest for the same, at the rate of five pounds *per centum, per annum*, which bond is now in the custody of this deponent, and to which for greater certainty, as to the dates, and contents thereof, this deponent refers. And this deponent doth admit, that the interest which hath accrued or become due, upon the said bond hath been paid, remitted, or otherwise satisfied unto this deponent, up to the day of last, And which was so paid, as this deponent hath been informed, and believes, by the order or direction, or on the account of the complainant *A. B.* executrix of the said *K. W.* deceased. But this deponent saith that the whole of the said principal money, or sum of 400*l.* together with the interest thereof, from the said day of last still remains due, and owing from the estate of the said *K. W.* unto this deponent as executrix of her said late husband deceased.

A. F.

Sworn, &c.

Affidavit

Affidavit in support of a Charge left at a Master's Office.

In Chancery.

Between *A. B.* Plaintiff.

and

C. D. Defendant.

C. D. of, &c. the defendant above named, maketh oath and faith, that *A. B.* the complainant above named, is, and now stands justly and truly indebted to this deponent, in the sum of 385*l.* together with 20*l.* 12*s.* 8*d.* costs of suit, under, and by virtue of a judgment recovered by this deponent against the said complainant, in his Majesty's court of Exchequer, at *Westminster*, for the penalty of a bond bearing date the day of 1782. and executed by the said complainant to this deponent, in the penal sum of 700*l.* conditioned for payment, to this deponent, of the sum of 350*l.* on the day of 1783. And this deponent faith, that the sum of 405*l.* 12*s.* 8*d.* is now justly due and owing to this deponent, under, and by virtue of the said judgment, so obtained as aforesaid, and for principal interest and costs of suit.

C. D.

Sworn, &c.

Affidavit of the Office-copy of a Judgment, being a true Copy examined and compared with the Records.

In Chancery.

Between *A. B.* Plaintiff.

and

C. D. Defendant.

E. K. of, &c. maketh oath and faith, that he, this deponent did, on the day of last, carefully examine and compare the paper-writing hereunto annexed, marked *A.* purporting to be an office-copy of

a judgment obtained in the court of Exchequer, at *Westminster*, by the said *C. D.* the defendant above named, against the said *A. B.* the plaintiff above named. And that the said paper-writing, is a true copy of the judgment-roll, in the above mentioned suit now remaining of record, unaltered, and unreversed in his Majesty's court of Exchequer aforesaid, at the office of pleas, in *Lincoln's Inn*, in the county of *Middlesex*.

E. K.

Sworn, &c.

Affidavit in support of a Charge made by the Holder of a Promissory Note, of many Years standing, given by a blind Person.

Between *A. B.* Plaintiff.

and

C. D. Defendant.

P. T. of, &c. maketh oath, and faith, that he hath been frequently called, to set his hand as a witness to notes, and other writings, to which *K. W.* the testator, in the pleadings mentioned, on account of the imperfection in his eyes, set his mark. And this deponent faith, that he hath looked upon a paper-writing marked on the back thereof, No. 4. purporting to be a promissory note, from the said *K. W.* to pay to Mr. *I. H.* or order upon demand, the sum of for value received, and dated the sixteenth day of And this deponent faith, the name of this deponent appears to be set as a witness to the said *K. W.* setting his mark to the said note, and this deponent faith, that the name *P. T.* so set, and subscribed as a witness, as aforesaid, appears to this deponent to be, and to the best of this deponent's knowledge and belief, is this deponent's hand-writing. And this deponent doth verily believe, that the mark set at the foot of the said note, was made by the said *K. W.*
and

and was set to the said note in this deponent's presence, but this deponent saith, that it being now upwards of twenty years since the said note was given, as appears from the date thereof: and this deponent not having made any particular memorandum, relating to his being present at the time the said note was so signed, as aforesaid, this deponent can only make oath to the particulars above stated, to the best of his knowledge and belief.

P. T.

Sworn, &c.

Certificates.

A Certificate is a matter in writing, under the hand or hands of masters, officers, or ministers of the court, informing the court of something under their respective administration or cognizance that is done, not done, or misdones; which a standing or other order, or the mandate of the court, or their duty, or the reason of the thing, requires them to acquaint the court with. And these the court gives much credit to*; especially from the Masters, and standing officers of the court.

The certificate of commissioners of any thing touching the execution of their commission, ought to be filed before it is read.

A Six-clerk's Certificate of an Answer being filed, and no Proceedings since, in order to dismiss a Bill for want of Prosecution.

In Chancery.

Between A. B. Plaintiff.

and

C. D. Defendant.

These are to certify, that the defendant's answer to the plaintiff's bill was filed the day of since which there has been no further proceedings, as appears by my book dated the day of

N. W.

* The Master certified that papers were not delivered in. The clerk offered to prove they were delivered in, but the court would not suffer averment against the Master's certificate. *Sol. Chan. Ca. 5.*

A Six-clerk's Certificate of no Proceedings after Replication.

Between *A. B.* Plaintiff.
and
C. D. Defendant.

These are to certify, that that the defendant's answer
to the plaintiff's bill, was filed the day of
to which the plaintiff replied the day of
since which there have been no further proceedings, as
appears by my book dated the day of
W. L. S.

*A Six-clerk's Certificate of Pleadings being filed in order to
set down a Cause for hearing.*

Between *A. B.* Plaintiff.
and
C. D. Defendant.

These are to certify, that the plaintiff's bill, and the
defendant's answer, and the plaintiff's replication to the
defendant's answer are duly filed, as appears by my book.
And I have seen the depositions published, dated this
day of *C. Z.*

*The like Certificate in order to set down a Cause on Bill
and Answer.*

In Chancery.

Between *A. B.* Plaintiff.
and
C. D. Defendant.

These are to certify that the plaintiff's bill, and the
defendant's answer are duly filed, as appears by my
book, dated the day of
S. R.

A Certificate of a Defendant not attending to be examined.

In Chancery.

Between *A. B.* Plaintiff.

and

C. D. Defendant.

These are to certify that on the day of
interrogations were exhibited in my office, by the
complainant in this cause, for the examination of the
defendant touching a contempt, alledged to be by him
committed, for breach of an injunction obtained in this
cause, since which time, the defendant hath not attended,
to be examined thereupon. Dated this day of

Henry Flitcroft Examiner.

These certificates are obtained by the clerks in court,
from the Six-clerk, or by the solicitors from the examiner,
or other officer of the court.

It were impossible to comprize within the compass of
one volume, precedents of every proceeding in a cause,
the foregoing therefore, will serve to shew the nature and
form of the most usual certificates in practice.

Motions.

A Motion is a prayer or request, *ore tenus*, of a party to the court, by counsel.

Some motions are of course, where, by a standing rule, or the known course of the court, the thing desired is to be granted, without hearing the other party.

In these, there needs no notice of the motion to the other side, and it should seem, motions of course cannot be opposed*, at least counsel ought not to oppose them; the adverse party however may move to set them aside, if the order so obtained be to his prejudice, or obtained upon false suggestion, or irregularly. There are others which would be of course, upon supposition of the facts standing single; but because there may probably be some latent matter or circumstance resting in the knowledge of the parties, which the court is not then apprized of, and the object of the motion appearing upon the statement of it, to be special and extraordinary, the court generally makes it *nisi*, although notice be given.

There are others not founded upon any general rule, or usage, and sometimes besides or against it, which are at the discretion of the court granted or denied, upon the weight and reason of the matter, as it appears upon the motion, or upon hearing of both sides.

Some of these, of small moment, and frequent, are generally granted without notice; if less frequent, and of more weight, then only *nisi*, if no notice.

Such of them as are very rare, and to special purposes, will seldom be granted in any sort without notice; and in general, an affidavit verifying the facts alledged, is re-

* Mos. 255.

quired to ground the motion. Notice of motion in writing signed by the party, his agent or solicitor must be served upon the adverse clerk in court, or left at his seat in the Six-clerks office, with his clerk or agent: and before the motion is made, an affidavit of the service of the notice must be made, and filed at the affidavit office; and an office copy thereof taken, if the adverse party do not attend, and notice is required to be proved.

Every notice of motion must be given two days at least before the day on which it is to be made; or rather, in more plain terms, the day next but one before the day on which the motion is to be made, unless such intervening day be *Sunday*. As if the motion is to be on *Thursday*, the notice must be on *Tuesday*, or on *Friday* for *Monday* following.

Where notice is necessary, every thing the party moves for should be expressed; for the court will not ordinarily extend the order beyond the notice. As where notice was, that the court would be moved, that the plaintiff might be put into possession, and a receiver appointed; the court would not order that nothing should be received by the defendant in the mean time; though the defendant did not oppose the motion.

Motions may stand over to be heard another day, when the court thinks fit. And if a notice of motion be given thrice, and not moved, the party giving it shall not move the same notice a fourth time; but the adverse counsel, upon producing these four notices, may pray the court that the party may pay the costs of the three former notices, before he moves the fourth notice, which the court may in a very gross case order. And if it be a matter of weight, and many counsel feed, the court might possibly refer it to a Master to tax the costs.

Many motions are now made touching the regular issuing forth and execution of commissions, process, and other matters of course, which heretofore were commonly referred to four of the six clerks, not in the cause, who
hearing

hearing the other two clerks towards the cause, did easily determine the question, without delay or charge to the suit*.

When by reason of the absence of a counsel, who should have defended a motion, the court thinks fit to put it off for that time, the former notice is often ordered to be continued or stayed, so as the matter may be moved another day, upon notice to such absent counsel only; and the order must be drawn up, passed, entered and served in the usual manner, or fresh notice given.

In term, every *Thursday* is a day appropriated for motions only; so are the first and last days of term. Motions of course may be made any day in term at the rising of the court; and sometimes special motions are allowed to be made, if they are not too long, and of great importance.

In vacation, seal days are only days of motions, and are appointed by the Lord Chancellor. Yet the morning after term, motions are always made at the Rolls, upon supposition that some may probably remain, which should have been moved, but could not, the last day of the term. No motions are heard after the last general seal after term, until the first general seal before the ensuing term. But things which require dispatch may be petitioned for, and right will be done; for this court is always open, and matters of course may be obtained as well upon petition as upon motion.

Notice of motion to take money out of court, must be to the party himself, except the court upon a previous motion have ordered so many days notice to the clerk in court, &c. as may be time enough to send the client notice, and to have his answer, if he be in any part of the kingdom, but hard to be found, and so shall be sufficient.*

The variety of shapes in which motions are made in this court to obtain relief, according to the peculiar circum-

* Pr. H. Ch. 33. † 1 Px. Alm. 40.

stances of each case, render it impossible to state every possible form in which a notice of motion may be given: The following forms of notices in ordinary cases may be so far descriptive of the general outlines of a notice of motion, as to give an idea to the young practitioner of the form in which notices of motions are generally conceived, from whence he may adapt the notice according to the relief prayed.

In Chancery.

Between *A. B.* Plaintiff,
and
C. D. Defendant.

Mr. *A. Z.*

Take notice, that the defendant intends to move this honourable court on *Monday* next, the 15th instant, or so soon after as counsel can be heard, that the plaintiff's bill may stand dismissed out of this court, for want of prosecution, with costs, to be taxed by one of the Masters of this court.

Dated this day of 1784.
Yours, &c.

C. K.

Solicitor for the said Defendant.

To Mr. *A. Z.*

Plaintiff's Clerk in Court.

*Motion to invest a sum of Money in the 3 l. per cent.
Annuities, and to appoint a Receiver to get in the
Arrears of Rent.*

In Chancery.

Between *A. B.* Plaintiff.
and
C. D. Defendant.

Mr. *Radcliffe,*

Take notice that this court will be moved on *Tuesday* the 20th day of *March* next, being the third general seal
after

after *Hilary* term, or so soon after as counsel can be heard on the part and behalf of *A. B.* the plaintiff above named, that the sum of 2338 *l.* 12 *s.* 5 *d.* cash in the Bank, standing in the name of the accountant general of this court, in trust in this cause, may be laid out and invested in Bank 3 *per cent.* consol. annuities, in the name and with the privity of the said accountant general subject to the further order of this court. And that *Stephen Jones*, the late receiver of the rents and profits of the estates in question in this cause, may pay into the Bank, in the name of the said accountant general, in trust in this cause, the sum of 500 *l.* being the balance in his hands, upon the foot of his last account; and that the same, when so paid in, may be laid out and invested in like annuities. And that a new receiver may be appointed to get in all the arrears of rent due from the several tenants of the premises. Dated this day of

Yours,

J. Brand.

Solicitor for the said

To Mr. *Radcliffe*, *A. B.* the Plaintiff above-named.
Clerk in Court for the Defendant, *C. D.*

Paying

Paying and receiving Money in Court.

ALL Sums of money ordered to be paid into this court, must, pursuant to *Stat. 12. Geo. 1.* be paid into the Bank with the privity of the accountant-general of this court, and placed to the credit of the cause. Any of the parties to the suit, where money is ordered to be paid into the Bank, may apply, by motion or petition, that such money may be laid out, and invested in government securities, for the benefit of the parties interested in the cause.

The decree or order directing money to be paid into the Bank, in the name, and with the privity of the accountant-general of this court, in trust in the cause, being drawn up, passed and entered at the Register-office, is to be produced at the accountant-general's office, and the accountant-general will thereupon give a direction, in writing to the party, paying in the money, to pay the same to one of the cashiers of the Bank, pursuant to the order. The party, or his solicitor, must attend the cashier accordingly; and when the money is paid, the cashier gives a receipt for the sum paid by the party paying the same, which receipt the solicitor either brings to the accountant-general's office, or leaves with the cashier, the receipt is afterwards left by one of the clerks of the accountant-general's office at the report-office to be filed. The last, and only remaining requisite is the accountant-general's certificate of the money being paid, wherein is stated the title of the cause, and that in pursuance of the order dated

The plaintiff or defendant hath paid into the Bank of *England* the sum of _____ which is placed to his account, as accountant-general, and to the credit of that cause in the books kept at the Bank, and in his office, as appears by the receipt of

Paying and receiving Money in Court. 495

one of the cashiers of the Bank, dated the day of thereto annexed. This certificate is filed by the accountant-general, at the report-office, an office-copy whereof must be taken from the accountant-general's office by the solicitor, and this being done the whole is completed.

The party intitled to money in this court, in order to obtain the same, must give notice in writing, to all the parties in the suit, of his intention to move the court, that the specific sum to which he is intitled, may be paid or transferred to him, by the accountant-general of this court. This notice being served in the usual manner, upon the clerks in court, for the several parties; the accountant-general's certificate of so much money standing in his name, to the credit of the cause, should be bespoken at the accountant-general's office, a day or two previous to the day whereon the motion is to be made. The court, upon hearing the report, or order, in favour of the party applying, and the certificate of the accountant-general, will make an order upon the accountant-general, to pay or transfer the money pursuant to the notice. To obviate any difficulties, an office-copy of the affidavit of service of the notice should be ready to read if called for. The motion being made, and the matters ordered, the senior's counsel's brief must be taken to the Register-office and the order drawn up, passed, and entered; a certificate must be obtained from the Report-office; and the order and certificate being produced at the accountant-general's office, the party intitled should attend with his clerk in court, (the solicitor will not be sufficient) at the accountant-general's office, who will identify the person applying, to be the person to whom the order has directed the money to be paid. And upon the party signing a receipt in the accountant-general's book, the accountant-general will give a cheque-note on the Bank, which being entered at the Report-office, must be carried to one of the Registers, to be signed by him. This being done,
the

496 **Paying and receiving Money in Court.**

the party will, upon application at the Chancery-office in the Bank, receive his money.

Parties only, or their legal representatives, or assigns, can obtain money from the accountant-general's office. Representatives must shew themselves to be such, by producing letters of administration, probate of the will, or assignment as the case may be, before they can receive the money. If the person to whom the money is due, cannot conveniently attend to receive the same, he must execute a letter of attorney, authorizing such person as he shall think proper, to receive the same, and on producing, and leaving the letter of attorney, and an affidavit of the due execution thereof at the accountant-general's office, he will thereupon give to the person named therein, a cheque-note on the Bank, to receive the money due. This letter of attorney, is usually made out at the accountant-general's office.

In order to apply for money due to infants, who have arrived at age, the petition stating the circumstance of the case must be drawn, ingrossed upon treble fixpenny stamped paper in the usual form, and presented either to the Lord Chancellor, or Master of the Rolls, and when answered, a copy thereof with his Lordship's or his Honour's order thereon must be served upon the clerks in court for the parties interested in the suit, three or four days previous to the attendance ordered. The accountant-general's certificate of the money in the cause, and to whose account, must be also procured from the accountant-general's office, and the Master's reports and the necessary decrees and orders in the cause, a certificate from the parish register-book of the baptism of the party applying, and also an affidavit verifying the certificate, and that the person applying is the person mentioned and described in such certificate. And upon hearing the report, of the money due, the decrees &c. and the certificate read, the court will make an order upon the accountant-general to transfer or pay the money reported due unless
upon

Paying and receiving Money in Court. 497

upon the adverse party's default of attendance the affidavit of service of the petition should be wanting, to prevent which, it is advisable to have one ready to produce, if called for. The order is to be drawn up, passed, and entered, at the register-office, and the money ordered, to be procured from the accountant-general, in manner herein beforementioned.

When money, by an order of this court, is paid into the accountant-general's hands, to be placed in the Bank, till it can be laid out according to the directions of the decree, if you move for an application of this money, you must not only have a certificate, that the money was paid into the Bank, but that it is actually in the Bank, at the time of the motion made. *1 Atk. 519. Anon.*

Petitions.

A Petition is the request of a person in writing, directed to the Lord Chancellor, or Master of the Rolls, shewing some matter or cause, wherein the petitioner prays some order or relief.

Most things which may be moved for, of course, may be also petitioned for. And petitions are upon so many various and different occasions, that to enumerate them in particular would be endless. It may be sufficient to observe in general, that they are either for special purposes, or for matters of course; as for a commission to plead, answer, or demur, &c. or to refer exceptions to an answer, filed in the vacation, to the sitting Master at the public office; or for a guardian to be assigned for an infant defendant, (if in the country) and to take the infant's answer by such guardian. Or if the defendant be a lunatick, or an idiot, that he may answer by his committee, (naming him,) appointed by the court. But if the infant live in *London*, or within ten miles thereof, (unless upon some extraordinary occasion,) he appears in court with some fit person to be his guardian; first writing a note of the plaintiff's and defendant's names, and underneath that, the said infant prays, that such a one, (naming him,) may be appointed his guardian, to answer the plaintiff's bill, and defend this suit; which the court usually grants, if they see no cause of impediment against the person to be assigned guardian, and an order is drawn up thereupon, by the register, and entered, and then the answer is sworn by such guardian. And petitions are also preferred, for several other matters; as to enlarge time for answering, or for *subpoena's* to rejoin, returnable immediately, and for commissions to examine witnesses in the country, and for enlarging publication, or paying money; &c. or for
2
removing

removing any hardships ; as to stay process of contempt on just cause, &c. or for amending of mistakes, &c.

Petitions may be preferred, before as well as after a bill filed ; as for a person to be admitted in *forma pauperis*.

Brevity and form, are the two things chiefly to be observed, in drawing them. And all petitions, even those to be admitted in *forma pauperis*, are to be ingrossed on treble six-penny stamps. But after admission, without stamps.

Sometimes they are upon collateral matters, as they have relation to some former suit, or cause depending, or to an officer of the court ; as to have a clerk in court, or solicitor's bill tax'd, or to oblige him to deliver up papers, &c.

And where a matter comes before the court by petition, and the court makes an order thereupon without any attendance, and the adverse party would discharge such order, or have any thing done touching the matter of such petition, he commonly applies by way of petition also ; but often times on motion, the court will do it.

Though no former order made in court, shall be altered, or even explained upon petition ; yet, the execution thereof may be stayed upon petition for a short time, till the matter can be moved and argued in court*, nor shall any commission for examining witnesses be discharged, or depositions or examinations suppressed upon petition, unless the matter be first referred to a Master, and a certificate had thereupon. Nor may an injunction to stay suits at law, be granted, revived, dissolved, or stay'd upon petition, nor an injunction of any other nature, pass by an order upon petition, without notice, and a copy of the petition first given to the other side ; the petition to be filed with, or drawn up by the register,

* Ord. Canc. 151.

and the order thereupon entered. And no sequestration, dismissal, retainer upon dismissal or final order is granted upon petition, nor shall the commitment of any person taken upon process of contempt, be discharged, but upon hearing the opposite party*.

A decree, much more an interlocutory order, if gained by collusion, may be set aside, on a petition. 3 *Will.* 3.

The delivering over the body of a ward, or possession of a trust estate, cannot be awarded on petition, but a bill must be brought for that purpose. 3 *Will.* 154.

After the petition is drawn and ingrossed, it must be delivered to the Chancellor's, or the Master of the Rolls's secretary, who is to get it answered, and if it be a matter of course, it is forthwith granted. But if it requires examination, or the other side to be heard, then it is usually ordered, that all parties attend the next day of petitions; at which time, the matter is debated, and such order made, as the court thinks fit. And in such cases, affidavits are frequently necessary to shew the court how matters stand on both sides.

And matters of great consequence, which require dispatch, may be petitioned for, in the vacation; and as for petitions of course, they are frequently preferred in the vacation, to the Master of the Rolls.

The Lord Chancellor is generally petitioned touching the setting down of pleas, demurrers or exceptions to be argued, and concerning special orders made by himself, and for rehearings. But in most other cases, application is made, to the Master of the Rolls, who may also be petitioned to rehear a cause heard before himself.

No *subpœna*, attachment, or other process of this court, (where made out by order of court) shall issue out upon any petition, until an order be drawn up, and entered thereupon. And all process otherwise issued shall be void †.

* Ord. Canc. 151.

† Ord. Canc. 49. 123.

Orders upon petitions, must be drawn up, passed, entered, and served by delivering a copy to the other party, as other orders are.

In an injunction cause, if the bill be not filed on the return of the *subpæna*, and costs are preferred for want thereof, the plaintiffs upon motion, or petition, may obtain an order for the defendant to accept the bill, *nunc pro tunc*, upon payment of costs out of purse.

Petition that Defendant may accept Plaintiff's Bill nunc pro tunc upon payment of Costs.

In Chancery.

Between *A. B.* Plaintiff.

and

C. D. Defendant.

To the Right Honourable the Master of the Rolls.

The humble petition of the plaintiff.

Sheweth,

That your petitioner having exhibited his bill in this honourable court, against the defendant, thereby praying, (among other things) for an injunction, &c. and having served the defendant with process to appear and answer the same, the said defendant appeared accordingly; but your petitioner's bill not being filed on the return day of the *subpæna*, though in a very few days after, the defendant's clerk in court refuses to accept the same, and insists upon costs.

Wherefore your petitioner humbly prays your Honour, that the defendant's clerk in court may be ordered to accept your petitioner's bill, upon payment of costs out of purse.

And your Petitioner, &c.

*Petition for Six Weeks Time to plead Answer, or Demurrer,
and for a Commission.*

In Chancery.

Between *H. R.* Plaintiff.
S. S. Defendant.

To the Right Honourable the Master of the Rolls.

The humble petition of the Defendant.

Sheweth,

That the plaintiff having filed his bill against your petitioner, he appeared thereto and hath taken a copy.

For as much as your petitioner is not in contempt, lives
in and has had no order for time.

Your petitioner therefore humbly prays your Honour, that he may have six weeks time to plead answer or demurrer to the plaintiff's bill, and that he may have a commission for that purpose, returnable without delay, and that the plaintiff may, in two days after notice hereof to his clerk in court, give your petitioner's clerk in court commissioners names to see the same taken, or in default thereof, that your petitioner may have such commission, directed to his own commissioners.

And your petitioner will ever
pray, &c.

Petition

Petition for a Month's further Time to answer.

Between *A. B.* Plaintiff.

C. D. Defendant.

To the Right Honourable the Master of the Rolls.

The humble petition of defendant.

Sheweth,

That the plaintiff having filed his bill, against your petitioner, he appeared thereto, and has taken a copy thereof.

For as much as your petitioner is not in contempt, lives in _____ and has had but one order for six weeks time to answer.

Your petitioner therefore, humbly prays your Honour, that he may have a month's further time to put in his answer to the plaintiff's bill.

And your petitioner will ever pray, &c.

In a petition for further time, the defendant must always mention, what time he had before obtained, otherwise he might delay the cause; and before a subsequent order for time, will be delivered out from the register-office, the preceding orders passed and entered, must be produced to the register.

Petitions.

Petition for a Month's further Time to plead Answer or Demurrer.

Between *A. B.* Plaintiff.

C. D. Defendant.

To the Right Honourable the Master of the Rolls.

The humble petition of defendant.

Sheweth,

That the plaintiff filed his bill in this court, to which your petitioner appeared.

That your petitioner resides in *Somersetshire*, and hath obtained an order for a commission to take his plea, answer, or demurrer thereto, and six weeks time to return the same, but he has not been able to prepare his answer, and is not in contempt.

Your petitioner therefore humbly prays your Honour, that he may have a month's further time to put in his plea, answer, or demurrer, to the said plaintiff's bill, not demurring alone.

And your petitioner will ever pray, &c.

Petition for three Weeks further Time.

Between *A. B.* Plaintiff.

C. D. Defendant.

To the Right Honourable the Master of the Rolls.

The humble Petition of Defendant

Sheweth,

That the plaintiff having filed his bill against your petitioner, he appeared thereto and has taken a copy thereof.

For-

Forasmuch as your petitioner is not in contempt, lives in _____ and has had but two orders for time, the last of which was peremptory.

Your petitioner therefore humbly prays your Honour that he may have three weeks further time to put in his answer to the plaintiff's bill.

And your Petitioner will ever pray, &c.

Petition for a Month's Time to answer in a Town Cause.

Between *A. B.* plaintiff.

C. D. Defendant.

To the Right Honourable the Master of the Rolls.

The humble Petition of the Defendant.

Sheweth,

That the plaintiff having filed his bill in this honourable court against your petitioner, and others, whereto your petitioner hath appeared, and taken an office-copy thereof, and his time for answering not being yet expired, nor being in contempt,

Your petitioner therefore most humbly prays your Honour, to grant unto your petitioner a month's time, to plead answer, or demurrer, to the plaintiff's bill, not demurring alone.

And your Petitioner will ever pray, &c.

*Petition for three Weeks further Time to answer in a
Town-cause.*

Between *A. B.* Plaintiff.
C. D. Defendant.

To the Right Honourable the Master of the Rolls.

The humble Petition of the Defendant.

Sheweth,

That the plaintiff having filed his bill against your petitioner, he appeared thereto, and has taken a copy.

Forasmuch as your petitioner is not in contempt, and has had but one order, for a month's time to answer.

Your petitioner therefore humbly prays your Honour that he may have three weeks further time to put in his plea, answer, or demurrer, to the plaintiff's bill not demurring alone.

And your Petitioner will ever pray, &c.

*Petition for a Fortnight's further Time to answer in a
Town-cause.*

Between *A. B.* Plaintiff.
C. D. Defendant.

To the Right Honourable the Master of the Rolls.

The humble Petition of the Defendant.

Sheweth,

That the plaintiff having filed his bill against your petitioner, he appeared thereto, and has taken a copy.

Forasmuch as your petitioner is not in contempt, and has had but two orders for time, the last of which was peremptory.

Your

Your petitioner therefore humbly prays your Honour, that he may have a fortnight's further time to put in his plea, answer, or demurrer, to the plaintiff's bill, not demurring alone.

And your Petitioner will ever, &c.

Petition for further Time, under Special Circumstances.

Between *A. B.* Plaintiff.

C. D. Defendant.

To the Right Honourable the Master of the Rolls.

The humble Petition of the Defendant.

Sheweth,

That in *Trinity* vacation last, the plaintiff filed his bill in this honourable court, against your petitioner, to which your petitioner appeared.

That on or about the 25th day of *January* last, your petitioner obtained an order, for a commission to take his plea, answer, or demurrer, to the plaintiff's said bill, not demurring alone, and for six weeks time to return the same.

That before the expiration of the time granted by the said order, a treaty for a compromise of the matters in question, in this cause was had, between your petitioner and the plaintiff, but the plaintiff's solicitor in town, not being acquainted therewith, caused an attachment to be sealed against your petitioner, for want of answer, returnable, in fifteen days after *Easter* last past.

That your petitioner, and the plaintiff, not being able, as they intended, to settle, by compromise, the matters in question, in this cause, it has been determined to bring the same to a hearing, in this honourable court, and your petitioner has accordingly applied to the plaintiff's clerk

in

in court, to clear the costs of the contempt incurred by the attachment, in order that your petitioner might apply to this honourable court, for a month's further time, to put in his answer; but the plaintiff's clerk in court, refuses to accept such costs, although he have not yet obtained a return from the sheriff to the said attachment, which he was intitled to do, so long ago as on the 30th. day of *April* last.

That your petitioner resides in the county of *Hereford*, and does not mean to cause any unnecessary delay in this cause.

Your petitioner therefore humbly prays your Honour, that he may have a month's further time, to put in his plea, answer, or demurrer, to the plaintiff's said bill, not demurring alone.

And your Petitioner will ever pray, &c.

Petition for further Time to answer, after the usual Orders obtained.

Between *A. B.* Plaintiff.
C. D. Defendant.

To the Right Honourable, &c.

The humble Petition of the Defendant.

Sheweth,

That the plaintiff, having filed his bill, in this honourable court against your petitioner, she appeared thereto.

That your petitioner having obtained the three usual orders for time, to put in her plea, answer, or demurrer, to the said bill, and your petitioner for the reasons hereinafter mentioned, not being able to put in her answer to the said bill by the day of being the day on which the last of the said orders expired, the plain-

plaintiff caused an attatchment to be sealed against your petitioner for want thereof.

That by an order made by your Honour, dated the 11th. day of *April* last, it was ordered that upon your petitioner's entering her appearance with the Register within one week, and upon paying or tendering to the plaintiff's clerk in court, the costs of the beforementioned attachment, that she should have a month's further time to put in her said plea, answer, or demurrer.

That your petitioner's defence to the said bill, hath been a long time past before your petitioner's counsel, but the same being of considerable length, and requiring much care in settling, the bill being for a discovery of your petitioner's title to estates of very great value, your petitioner's counsel hath not yet been able to complete the same, but is using his utmost dispatch for that purpose, and no unnecessary delay is intended, on the part of your petitioner to the plaintiff.

Your petitioner therefore, humbly prays your Honour, that she may have further time, until the 31 day of this instant *May*, to put in her plea, answer, or demurrer, to the plaintiff's bill, and in the mean time, all proceedings for want thereof may be staid.

And your Petitioner will ever pray, &c.

*Petition for Plaintiff to give Security to answer Costs, and
for a Month's Time to answer after such Security given.*

In Chancery.

Between A. B. Plaintiff.

C. D. Defendant.

To the Right Honourable,* &c.

The humble Petition of the Defendant.

Sheweth,

That the plaintiff having filed his bill, in this honourable court, against your petitioner, and caused a *subpœna* to appear and answer to the said bill, to be served on your petitioner, to which your petitioner hath accordingly appeared, and taken a copy of the said bill, and his time for answering not being yet expired, nor being in contempt.

That the plaintiff by his bill, files himself of *Grenada* in the *West Indies*, in parts beyond the seas, and your petitioner lives in the city of *London*.

Your petitioner therefore most humbly prays your Honour, that the plaintiff may procure some sufficient person resident in *England*, to give security according to the course of the court, to answer costs before your petitioner be obliged to answer the said bill, and that your petitioner may have a month's time to plead, answer, or demur, to the said bill, after such security given.

And your Petitioner, &c.

Petition

*Petition, (after an Attachment,) for a Dedimus, and
for Time to return the Answer thereon.*

In Chancery.

Between *A. B.* Plaintiff.

C. D. Defendant.

To the Right Honourable, &c.

The humble Petition of the Defendant.

Sheweth,

That the plaintiff having exhibited his bill into this honourable court against your petitioner, and others, and served your petitioner with process, returnable the first day of last term, your petitioner appeared thereto, but the writings that related to the matters in question, not being in your petitioner's hands, your petitioner could not possibly procure the same, so as to perfect his answer, by the time allowed by the course of the court, whereupon your petitioner has been lately arrested upon an attachment of contempt, issuing out of this honourable court.

That you petitioner lives one hundred miles distant from *London*, and being willing to enter his appearance with the register by his clerk in court, as upon the attachment.

Your petitioner therefore most humbly prays your Honour that he may be at liberty to take out a *Dedimus potestatem*, returnable the first return of next term, to take his answer, and that he may have a week allowed him within the said term, to return the same, and that in the mean time, all further proceedings for want of the same may be stayed.

And your Petitioner, &c.

Petition

*Petition for a Commission after a Serjeant at Arms.*Between *A. B.* Plaintiff.*C. D.* Defendant.

To the Right Honourable, &c.

The humble Petition of the Defendant.

Sheweth,

That your petitioner appeared to the plaintiff's bill the instant, which appears to have been filed the day of last, and your petitioner finds, he is in contempt to a serjeant at arms upon a *non est inventus*, returned upon a commission of rebellion for not appearing thereto in time.

That your petitioner is desirous forthwith to discharge his said contempt, by paying the plaintiffs their costs, in respect thereof, and also, of putting in his answer to the plaintiff's bill, as soon as may be, in regard your petitioner lives in the county of and must answer by commission.

Your petitioner therefore humbly prays your Honour, that the plaintiff's clerk in court may forthwith deliver to your petitioner's clerk in court, a bill of costs in respect of your petitioner's contempt, and that it may be referred to one of the Masters of this court, to tax the said bill, in case the said clerks in court differ in settling the same, and that upon your petitioner's payment of the said costs so settled, or taxed, all further proceedings upon the said contempt may be stayed. In the mean time,
that

that your petitioner may be at liberty to sue out a commission to plead, answer, or demur, and have a month's time to return the same.

And your Petitioner will ever pray, &c.

Petition to be discharged out of Custody of the Serjeant at Arms.

In Chancery.

Between *A. B.* and *C. D.* Plaintiffs.

E. F. and *G. H.* Defendants.

To the Right Honourable the Master of the Rolls.

The humble Petition of the Defendants.

Sheweth,

That your petitioners are and have been (for above a fortnight) in custody of the Serjeant at arms attending this honourable court, for not answering to the plaintiff's bill, which your petitioners have since answered, and paid the costs of the contempt; and the clerk of the other side doth consent to your petitioner's discharge, as by the certificate annexed appears.

Your petitioners therefore humbly pray your Honour, that your petitioners may be discharged out of the custody of the Serjeant at arms, paying their fees.

And your Petitioners shall ever pray, &c.

*Petition to take an Answer, de novo, and to amend the
Caption and stay Process.*

Between *A. B.* Plaintiff.
C. D. Defendant.

To the Right Honourable the Master of the Rolls.

The humble Petition of the Defendant.

Sheweth,

That in *Hilary* term last, the plaintiff filed his bill in this honourable court, against your petitioner, and a commission issued to take your petitioner's answer, by virtue whereof it was taken, returned, and filed; but on looking into the same, there appeared to be a mistake in the caption, whereupon the plaintiff obtained an order to suppress the said answer, it not appearing by the said caption, that your petitioner was ever sworn to the truth of the said answer.

That in regard this is in your petitioner's own delay, who is desirous that this mistake should be rectified, and is ready and willing to pay the plaintiff his costs out of purse, touching the said order.

Your petitioner therefore most humbly prays your Honour, that he may be at liberty to sue out another commission, directed to the former commissioners, to take his said answer, *de novo*, and that the caption thereof may be rectified, or amended, and that your petitioner may have three weeks time to return the same, and that all further proceedings for want thereof, be in the mean time stayed.

And your Petitioner shall ever pray, &c.
Petition

*Petition for Six Weeks Time, to answer Amendments and
Exceptions in a Country Cause.*

Between *A. B.* Plaintiff.
C. D. Defendant.

To the Right Honourable the Master of the Rolls.

The humble Petition of the Defendant.

Sheweth,

That your petitioner's answer being reported insufficient, the plaintiff obtained an order to amend his bill, and that your petitioner might answer the amendments and exceptions at the same time.

That the amended bill is lately filed, and very long.

Forasmuch as your petitioner is not in contempt, lives in shire, and has had no order for time to answer the amendments and exceptions.

Your petitioner therefore humbly prays your Honour, that he may have a month's time to put in his plea, answer, or demurrer, to the said amended bill and exceptions.

And your Petitioner will ever pray, &c.

Petition to put in an Answer without Oath.

In Chancery.

Between *A. B.* Plaintiff.
C. D. Defendant.

To the Right Honourable, &c.

The humble Petition of the Defendant.

Sheweth,

That your petitioner is made a party to the plaintiff's bill, exhibited in this court, merely for the sake of form.

That

That the plaintiff is willing that your petitioner's answer to the said bill should be put in without oath, and hath by his clerk in court, signified his consent thereto.

Your petitioner therefore humbly prays your Honour, that he may have leave to put in his answer without oath, to the plaintiff's bill.

And your Petitioner shall ever pray, &c.

Note, To this petition, and all other petitions, which require the clerk in court's consent, he signs in these words, I do consent to the prayer of this petition, if your Honour shall please to order the same.

John Radcliffe.

Petition of a Feme Covert to answer separate from her Husband.

Between *A. B.* Plaintiff,
C. D. and *E.* his Wife, Defendants.

To the Right Honourable, &c.

The humble Petition of the Defendant *E. D.*
Wife of Defendant *C. D.*

Sheweth,

That the plaintiff hath exhibited his bill in this honourable court, against your petitioner, and her said husband whereto your petitioner hath appeared, and in regard your petitioner's said husband hath absconded, and lived separate from her these two years.

Your petitioner therefore most humbly prays your Honour, that she may be at liberty to put in her answer to the plaintiff's said bill without her husband.

And your petitioner, &c.

*Petition for a Commission to assign a Guardian, and to take
the Defendant's Answer by such Guardian.*

Between *A. B.* Plaintiff.
C. D. Defendant.

To the Right Honourable, &c.

The humble Petition of the Defendant.

Sheweth,

That the plaintiff exhibited his bill in this honourable court against your petitioner to which he hath appeared and taken a copy.

That your petitioner residing in the county of has craved a commission to take his answer, and the plaintiffs have given commissioners names for that purpose.

But inasmuch as your petitioner is an infant, and cannot answer the plaintiff's bill, nor defend this suit without having a guardian, assigned for that purpose.

Your petitioner therefore humbly prays your Honour that he may be at liberty to sue out a commission to assign him a guardian, and to take his plea, answer or demurrer, by such guardian.

And your Petitioner shall ever pray, &c.

*Petition for a special Commission and for Commissioners
Names, or in default, the Commission to issue ex parte.*

In Chancery.

Between *A. B.* Plaintiff.

C. D. Defendant.

To the Right Honourable, &c.

The humble Petition of the Defendant.

Sheweth,

That on the day of last, the plaintiff exhibited his bill in this honourable court, against your petitioner, who has appeared thereto, and taken a copy.

That your petitioner resides in the county of
is not in contempt, and is advised to plead,
answer, and demur to the said bill.

Your petitioner therefore most humbly prays
your Honour, that he may be at liberty to
take out a commission to plead, answer,
and demur, to the plaintiff's bill, and that
the plaintiff's clerk in court may, in two
days after notice hereof, give commissioner's name to the petitioner's clerk in court,
to take your petitioner's plea, answer, and
demurrer, or in default thereof, that your
petitioner may be at liberty to take out the
said commission, directed to his own
commissioners.

And your Petitioner, &c.

Petition for the Lord Chancellor's Letter missive.

In Chancery.

Between *A. B.* Plaintiff.

and

Thomas Earl of and others
Defendants.

To the Right Honourable the Lord High Chancellor
of Great Britain.

The humble Petition of the Plaintiffs.

Sheweth,

That your petitioners have exhibited their bill in this
honourable court, against the said Earl of
and others.

Your petitioners therefore most humbly pray
your Lordship's letter missive, directed to
the said *Thomas* Earl of
desiring him to appear to, and answer your
petitioner's said bill, on the sixth day of
November next.

And your Petitioners shall ever pray, &c.

Petition

Petition for a Subpœna returnable immediately.

In Chancery.

Between *A. B.* Plaintiff.

C. D. Defendant.

To the Right Honourable the Master of the Rolls.

The humble Petition of the Plaintiff.

Sheweth,

That your petitioner having filed his bill in this honourable court, against the said defendant, and the said defendant living and residing within ten miles of the city of *London*, as by the affidavit annexed appears.

Your petitioner therefore most humbly prays your Honour, that he may be at liberty to take out process of *subpœna* for the said defendant to appear to, and answer your petitioner's said bill, returnable immediately.

And your Petitioner shall ever pray, &c.

Petition for Process of Contempt, returnable immediately.

Between *A. B.* Plaintiff.

C. D. Defendant.

To the Right Honourable the Master of the Rolls.

The humble Petition of the Plaintiff.

Sheweth,

That your petitioner, in *Easter* term last past, exhibited his bill in this honourable court, against the defendant, to which the said defendant appeared, but hath neglected to put in his answer thereto; and the said defendant living and residing within the distance of ten miles from the city of *London*, as by the affidavit annexed appears.

Your

Your petitioner therefore humbly prays your Honour, that he may be at liberty to make out process of contempt against the said defendant, for want of his answer, returnable immediately,
And your Petitioner shall ever pray, &c.

A Petition of Plaintiffs to be admitted in forma Pauperis.

In Chancery. Between *A. B.* and others, Complainants.
C. D. and others, Defendants.

To the Right Honourable the Master of the Rolls.

The humble petition of the Plaintiffs.

Sheweth,

That your petitioners having filed their bill in this honourable court, against the said defendants, thereby setting forth that *H. O.* late of _____ in the county of _____ widow, deceased, at the time of her death, which happened in *April, 1731.* was possessed of a personal estate, value 1500*l.* and died intestate, without issue, leaving your petitioners, and the defendants and _____ her nearest relations, and next of kin, to whom her personal estate ought to have come, and been equally divided amongst them, according to the statute of distribution of intestate's estates.

That the intestate dying at _____ aforesaid, and your petitioners living very remote from her, and defendant *E.* wife of defendant *B.* living with, or near the intestate, at her decease obtained administration to her, and she, and her said husband possessed themselves of all the intestate's personal estate and effects, and your petitioners being entire strangers to the intestate's circumstances, the said defendant *B.* and his wife sent to the plaintiff *N.* 56*l.* and to the plaintiff 50*l.* separately assuring them, that the said
respective

respective sums, were your petitioner's respective full distributive shares of the said intestate's personal estate, and at the same time sent general releases therewith, which your petitioners, upon such report and assurances, were prevailed upon to execute, relying on such assurances to be true.

That your petitioners have since discovered, that the said intestate died, possessed of a personal estate, value 1500*l.* as aforesaid, and that they were imposed upon in the said releases, the same being obtained by fraud and false suggestions: and therefore filed their bill in this honourable court, against the said defendants, to set aside the release further than they extend as discharges for 50*l.* and 56*l.* and to have an account of all the intestate's personal estate, and that your petitioners may be paid their full and distributive shares, of all the said intestate's personal estate.

That the said defendants *H. B.* and *E.* his wife, have put in their separate answers, to your petitioner's said bill, and the said *H. B.* (amongst other things,) admits the said intestate died without issue, possessed of a personal estate, of about 1000*l.* which he and his said wife possessed themselves of, and that the petitioners were intitled as aforesaid, and that they received no more than the aforesaid respective sums of 56*l.* and 50*l.* and were induced to give releases, or discharges as aforesaid, which he says he believes they would not have given, if truly informed of the said personal estate, and the said *E. B.* (amongst other things,) admits the said intestate died, possessed of a considerable personal estate, but insists that your petitioners executed general releases, to her and her husband, at the times they received the said respective sums of 56*l.* and 50*l.* and insists on there being sufficient discharges, but has not thought fit to plead the said releases.

That your petitioners, by reason of their poverty, as appears by affidavit annexed, are utterly unable to prosecute

eute their said suit, unless they be admitted, *forma pauperis*.

Your petitioners therefore most humbly pray your Honour, that they may be admitted to prosecute their said suit, in *forma pauperis* and that Mr. may be assigned their counsel and Mr. their Six-clerk.

And your Petitioner shall ever pray, &c.

I humbly conceive, that the plaintiffs have just cause to be relieved, touching the matters of this petition, and for which they have exhibited their bill.

I. M.

Petition of a Defendant to be admitted in forma pauperis.

In Chancery.

Between A. B. Plaintiff.

C. D. Defendant.

To the Right Honourable, the Master of the Rolls.

The humble Petition of the Defendant.

Sheweth,

That your petitioner is served with process to appear to, and answer the plaintiff's bill, but being very poor (as by affidavit appears) is by reason of such his extreme poverty, unable to make his defence thereto, if not permitted to [defend in *forma pauperis*.

Your petitioner therefore most humbly prays your Honour to admit him to defend this suit in *forma pauperis*, and to assign him for his counsel, Mr. and Mr. for his Six-clerk.

And your Petitioner shall ever pray, &c.

Petition

Petition to appoint a Day for an absconding Defendant to appear.

In Chancery.

Between *A. B.* Plaintiff.

C. D. Defendant.

To the Right Honourable the Master of the Rolls.

The humble Petition of the Plaintiff.

Sheweth,

That your petitioners some times since exhibited their bill in this court against the defendant *C. D.* and others, and in the month of last, took out process of *sub-pæna* under seal of this court, against him the said defendant, to compel him to appear to and answer the said bill, and the utmost endeavours have been used to serve him with the said process, and the most strict enquiry hath been made after him, at his last known usual place of abode, and at several other places, but cannot find him, to serve him; and there is reason and just ground to believe, that he absconds for debt, and to avoid being served with the process of this honourable court, and of other courts, as by affidavit annexed appears, and in regard the said defendant has not yet appeared to your petitioner's said bill,

Your petitioners therefore humbly pray your Honour to appoint a short day for the said *C. D.* to appear to, and answer your petitioner's said bill.

And your Petitioner will ever pray, &c.

Petition

Petition for a habeas corpus cum causis, at the instance of the Party taken upon an Attachment, in order that he may be turned over to the Fleet Prison.

In Chancery.

Between *A. B.* Plaintiff.
C. D. Defendant.

To the Right Honourable the Master of the Rolls.

The humble petition of the Defendant.

Sheweth,

That the plaintiff having filed his bill against your petitioner, he has appeared thereto, and taken a copy.

But your petitioner not having put in his answer, in due time, an attachment issued against him, upon which he has been arrested, and now remains in the custody of the sheriff of *Middlesex*.

Ordered that a writ of *habeas corpus cum causis*, do issue, directed to the sheriff of *Middlesex*, thereby commanding him to bring the body of the petitioner into this court, on *Tuesday* next, the 15th day of *July* instant, in order that he may answer his contempt, and be discharged therefrom, and otherwise be dealt with according to law.

Your petitioner therefore humbly prays your Honour, that a writ of *habeas corpus cum causis*, may issue out of this honourable court, directed to the said sheriff of the county of *Middlesex*, thereby commanding him to bring the body of your petitioner into this honourable court, on *Tuesday* next the 15th day of *July* instant, in order that your petitioner may answer his contempt, and be discharged therefrom, or may otherwise be dealt with according to law.

And your Petitioner shall ever pray, &c.

Petition

Petition to renew a Sequestration.

Between *A. B.* Plaintiff.

C. D. Defendant.

To the Right Honourable the Lord High Chancellor of *Great Britain*.

The humble Petition of the Plaintiff.

Sheweth,

That the defendant having refused to answer your petitioner's bill, all process of contempt to a sequestration hath been sued out against him, and a commission of sequestration hath been sued out, executed and returned, but your petitioner hath since discovered that not above one third part of the said defendant's estate is sequestered, and that the said commission was committed to the hands of a person therein named, who neglected to sequester the said estate.

Your petitioner therefore most humbly prays your Lordship, that he may be at liberty to take out a new commission of sequestration, to sequester the said defendant's estate, directed to new commissioners.

And your Petitioner shall ever pray, &c.

*Petition to withdraw a Replication, and amend a Bill upon
Payment of Twenty Shillings Costs to such Defendants
as have answered.*

In Chancery.

Between *A. B.* Plaintiff.
C. D. and others Defendants.

To the Right Honourable, &c.

The humble petition of the Plaintiff.

Sheweth,

That some time since your petitioner filed his bill in this honourable court, against the said defendants, to which they appeared, and answered, and your petitioner replied, but no witnesses have been yet examined in the said cause.

That your petitioner is since advised to amend his said bill, by adding *R. B.* a defendant thereto, and for as much as this is in your petitioner's own delay,

Your petitioner most humbly prays your Honour, that he may have leave to withdraw his replication, and amend this bill, as he shall be advised on amending the copies of the said bill of such of the defendants who have answered the same, your petitioner not requiring any answer to such amended bill, from the said defendants, who have already answered.

And your Petitioner shall ever pray, &c.

Petition to amend a Bill, by adding a Defendant.

In Chancery.

Between *A. B.* Plaintiff.
C. D. Defendant.

To the Right Honourable the Master of the Rolls.

The humble Petition of the Plaintiff.

Sheweth,

That your petitioner filed his bill in this honourable court, against the defendant in term last, to which defendant hath appeared and put in his answer; upon which your petitioner is advised to make *E. F.* a defendant in his cause.

Your petitioner therefore most humbly prays your Honour that he may have leave to amend his bill, by adding the said *E. F.* a defendant thereto.

And your Petitioner shall ever pray, &c.

Petition to amend a Bill, on Payment of Twenty Shillings Costs.

In Chancery.

Between *A. B.* Plaintiff, and
C. D. and others, Defendants.

To the Right Honourable, &c.

The humble Petition of the Plaintiff.

Sheweth,

That your petitioner filed his bill in this honourable court, against the defendant *C. D.* and others, the said defendant *C. D.* hath only put in his answer thereto, (none

M m

other

other of the defendants having yet appeared;) upon perusal of whose answer, your petitioner is advised by his counsel to amend his bill.

Your petitioner therefore most humbly prays your Honour, that he may be at liberty to amend his bill, upon payment of twenty shillings costs, to the said defendant *C. D.* or his clerk in court, in respect thereof.

And your Petitioner shall ever pray, &c.

Petition for a Plaintiff to dismiss his own Bill with Costs.

In Chancery.

Between *A. B.* Plaintiff.

C. D. Defendant.

To the Right Honourable the Master of the Rolls.

The humble Petition of the Plaintiff.

Sheweth,

That your petitioner exhibited his bill into this honourable court, against the defendant, since which the said defendant hath put in his answer; upon perusal whereof, your petitioner is advised to dismiss his bill.

Your petitioner therefore most humbly prays your Honour, that his said bill may stand dismissed out of this court with costs, to be taxed by one of the Masters of this court.

And your Petitioner shall ever pray, &c.

Petition

Petition to withdraw a Plea and Demurrer.

In Chancery.

Between *A. B.* Plaintiff.

C. D. Defendant.

To the Right Honourable the Master of the Rolls,

The humble Petition of the Defendant.

Sheweth,

That the plaintiff having filed his bill in this honourable court, against your petitioner, and your petitioner having put in his plea and demurrer thereto, your petitioner is since advifed, to make other defence to the faid bill,

Your petitioner therefore prays your Honour that he may withdraw his faid plea, and demurrer upon paying the plaintiff or his clerk in court 20*s.* cofts.

And your Petitioner shall pray, &c.

A Common Petition to receive Exceptions.

In Chancery.

Between *A. B.* Plaintiff.

C. D. Defendant.

To the Right Honourable, &c.

The humble Petition of the Plaintiff.

Sheweth,

That your petitioner having exhibited his bill in this honourable court, against the defendant, who hath put in his answer thereto, and your petitioner being advifed, that the faid answer is insufficient, in feveral material points,

M m 2

hath

hath caused exceptions to be taken thereto, but the said exceptions not coming in by the time limited by the rules of this court, the defendant's clerk in court refuses to accept the same.

Your petitioner therefore most humbly prays your Honour, that the said defendant's clerk in court, may receive the said exceptions, *non pro tunc*.

And your Petitioner shall ever pray, &c.

Exceptions cannot be ordered to be received as in due time after three terms from the putting in of the answer, without special reasons.

Another Petition to receive Exceptions.

In Chancery.

Between *A. B.* Plaintiff.
C. D. and others, Defendants.

To the Right Honourable, &c.

The humble petition of the Plaintiff.

Sheweth,

That your petitioner having exhibited his bill in this honourable court, against the said defendant and others, the said defendant put in his plea and answer, on arguing of which plea, on the day of last, it was ordered, that the same should stand for an answer, with liberty to your petitioner to except such matters as in the said order are mentioned.

That your petitioner has many material exceptions to offer in pursuance of the said order, but the drawing up, and entering of the said order, and preparing the said exceptions,

ceptions, which are long, having already run out more than the time of course, for delivering exceptions, the defendant's clerk in court refuses to accept the same.

Your petitioner therefore most humbly prays your Honour, that the said defendant's clerk in court, may receive your petitioner's exceptions, *nunc pro tunc*.

And your Petitioner shall ever pray, &c.

A Common Petition to refer Exceptions.

In Chancery.

Between *A. B.* Plaintiff.

C. D. Defendant.

To the Right Honourable, &c.

The humble Petition of the Plaintiff.

Sheweth,

That your petitioner having filed exceptions to the defendant's answer, and the time for submitting being expired

Your petitioner therefore most humbly prays your Honour, that it may be referred to one of the Masters of this court, to certify whether the said defendant's answer be sufficient in the points excepted to, or not.

And your Petitioner shall ever pray, &c.

Another Petition to refer Exceptions.

In Chancery.

Between *A. B.* Plaintiff.*C. D.* Defendant.

To the Right Honourable, &c.

The humble Petition of the Plaintiff.

Sheweth.

That your petitioner having exhibited his bill in this honourable court, against the said defendant, he appeared, and put in his plea and answer thereto; on arguing of which plea, on the day of last, the same was ordered to stand for an answer, with liberty to your petitioner to except to such matters, as in the said order are mentioned.

That your petitioner obtained your Honour's order of the day of last, that the defendant's clerk in court should receive exceptions, as in due time; and accordingly, your petitioner soon after delivered exceptions to the defendant's clerk in court, but the said defendant hath not submitted to put in a further answer, although his time for so doing is expired, by the rules of this court.

Your Petitioner therefore most humbly prays your Honour, that it may be referred to one of the Masters of this court, to look into your petitioner's bill, the defendant's plea and answer, and your petitioner's exceptions, and certify wherein the said plea and answer is insufficient.

And your Petitioner shall ever pray, &c.

Petition

*Petition for a Commission de bene esse before
Defendants appearance.*

In Chancery.

Between *A. B.* Plaintiff.

C. D. Defendant.

To the Right Honourable the Master of the Rolls.

The Plaintiff's humble Petition.

Sheweth,

That he hath lately exhibited his bill against the said defendant to perpetuate the testimony of *John Edwards*, of ———, and *Elizabeth* his wife, and sued out *subpœnas* against the said defendants, returnable on the morrow of *All Souls* next ensuing, but he hath not appeared thereto, as by the Six Clerk's certificate appears.

Forasmuch as the said *John Edwards*, is now in the 80th year of his age, and the said *Elizabeth*, the wife of the said *John Edwards*, is in the 70th year of her age, and are very weak and infirm, and in all probability not likely to live long (as by affidavit annexed appears) and by reason of their great age, may not live to be examined in chief, and are very material witnesses for your petitioner, and without whose testimony your petitioner cannot proceed to a hearing in this suit, or defend an action brought against her in the Court of Common Pleas.

Your petitioner therefore humbly prays your Honour, that she may be at liberty to sue out a commission to examine the said *John Edwards*, and *Elizabeth* his wife, as witnesses *de bene esse*, for your petitioner, returnable without delay, directed to her own commissioners.

And your Petitioner shall ever pray, &c.

Petition to examine a Witness de bene esse before Issue joined.

In Chancery.

Between *A. B.* Plaintiff.

C. D. Defendant.

To the Right Honourable the Master of the Rolls.

The humble Petition of the Plaintiff.

Sheweth,

That your petitioner filed his bill in this honourable court against the said defendant, whereto he hath appeared, but the said defendant living a great distance from *London* in the country, he hath obtained time to put in his answer, till the first day of next *Hilary* Term.

That one *G. H.* of ———, gentleman, a very material witness for your petitioner in this cause, and without the benefit of whose evidence your petitioner (as he is advised) cannot safely proceed to a hearing of this cause, and the said *G. H.* being seventy years of age or upwards, and from his advanced years not likely to live till he can be examined in chief as by affidavit annexed appears.

Your Petitioner therefore most humbly prays your Honour, that he may be at liberty forthwith to examine the said *G. H. de bene esse* as a witness, for your petitioner in this cause saving all just exceptions.

And your Petitioner shall ever pray, &c.

Petition for a Subpœna to rejoin, and Service thereof on the Clerk in Court, and for a Commission to examine Witnesses, &c.

In Chancery.

Between *A. B.* Plaintiff.

C. D. and others, Defendants.

To the Right Honourable the Master of the Rolls.

The humble Petition of the Plaintiff.

Sheweth,

That your petitioner filed his bill in this court against the said defendants, who have appeared thereto, and put in their answers, to which your petitioner hath replied, and is desirous to speed his cause.

Your petitioner therefore humbly prays your Honour, that he may be at liberty to take out *subpœnas* to rejoin, returnable immediately, and that service thereof on the defendants clerks in court may be deemed good service on the defendants, and that your petitioner may be at liberty to sue out a commission for examination of his witnesses, returnable without delay, and that the defendants clerks in court, do in four days after notice hereof, join and strike commissioners names with your petitioner's clerk in court, or in default thereof, that your petitioner may have a commission directed to his own commissioners, with liberty to execute the same in term time.

And your Petitioner shall ever pray, &c.

Petition for a Commission to examine Witnesses, Plaintiff not having sued out a Commission.

In Chancery.

Between A. B. Plaintiff.

C. D. Defendant.

To the Right Honourable the Master of the Rolls.

The humble petition of the Defendant.

Sheweth,

That the plaintiff obtained an order for a *subpoena* to rejoin, but did not thereby pray a commission for examination of witnesses in this cause.

Forasmuch as your petitioner hath several material witnesses to examine, whose evidence (he is advised) will be material on the hearing of this cause.

Your petitioner therefore humbly prays your Honour, that he may be at liberty to sue out a commission for the examination of his witnesses, returnable without delay, and that the plaintiff's clerk in court, may in four days join and strike commissioners names with your petitioner's clerk in court, or in default thereof, that your petitioner may have such commission directed to his own commissioners, with liberty to execute the same in term time.

And your Petitioner shall, &c.

Petition

*Petition to join and strike Commissioners Names, or in default
to issue a Commission ex parte.*

In Chancery.

Between P. C. Plaintiff.
C. P. Defendant.

To the Right Honourable, &c.

The humble Petition of the Defendant.

Sheweth,

That on the day of last, your petitioner was served with an order obtained upon the plaintiff's petition of the day of , for a *subpœna* to rejoin returnable immediately, and that service thereof on your petitioner's clerk in court should be good service, and that the petitioner's clerk in court, should in four days after notice, join and strike commissioners names with the plaintiff's clerk in court, or that in default thereof, the plaintiff might sue out a commission, directed to his own commissioners.

That your petitioner upon receiving the same, was ready to comply with the terms therein mentioned, and accordingly applied to the plaintiff's clerk in court to join and strike commissioners names with him, who informed your petitioner's clerk in court that he had not names, and put him off with trifling excuses.

That your petitioner has very good reason to believe that such excuses were made merely for delay, and in regard your petitioner hath several material witnesses as he is advised to examine, and is desirous the cause should be speeded.

Your petitioner most humbly prays your Honour, that the plaintiff's clerk in court may in four days after notice, join and strike commissioners names with your petitioner's

Petitions.

tioner's clerk in court, or that in default thereof, your petitioner may sue out a commission for examination of witnesses directed to his own commissioners, with liberty to execute the same in term time.

And your Petitioner shall ever pray, &c.

Petition for his Honour to strike Names, Plaintiff refusing so to do.

In Chancery.

Between *A. B.* Plaintiff.

C. D. Defendant.

To the Right Honourable, &c.

The humble Petition of the Defendant.

Sheweth,

That your petitioner obtained an order dated 24th of April instant, for a commission to examine witnesses returnable without delay, and that the plaintiff's clerk in court, should in four days after service thereof, join and strike commissioners names with your petitioner's clerk in court, which order was duly served on the 25th instant.

That the plaintiff's clerk in court did on the 29th instant, join with your petitioner's clerk in court, and named four commissioners, viz. *A. B. C. D. E. F. G. H.* of whom your petitioner has struck out *C. D. E. F.* and your petitioner named *J. K. L. M. N. O. P. Q.* but the plaintiff's clerk in court now refuses to strike your petitioner's names.

Forasmuch as your petitioner has many material witnesses as he is advised to examine, and is desirous to speed his cause.

J. K.

L. M.

N. O.

P. Q.

Your

Petitions.

541

Your petitioner therefore humbly prays your Honour would be pleased to strike out such two of your petitioner's commissioners as to your Honour shall seem meet.

And your Petitioner shall ever pray, &c.

Petition to alter a Commissioner's Name in a Commission to examine, and for Liberty to renew the same, and for Time to return it.

In Chancery.

Between *Henry Kenfit*, Plaintiff.

Samuel Sadler, Defendant.

To the Right Honourable, &c.

The humble Petition of the Plaintiff.

Sheweth,

That your petitioner last *Easter* vacation took out a commission to examine witnesses, wherein the defendant joined, but your petitioner was not able to execute the same during that vacation.

That your petitioner is in hopes of executing the same this vacation, but one of the commissioners (*to wit*) *H. W. Esq;* is engaged to be in *London*, whereupon your petitioner hath named the persons subscribed in his room, but the defendant refuses to strike the said names, in hopes of delaying your petitioner, and that the vacation may be lost.

T. W.

R. H.

Your petitioner therefore most humbly prays your Honour, that he may be at liberty to alter the commission, and that your Honour

Honour will be pleased to appoint, which of the two persons subscribed shall stand in his room, and that your petitioner may be at liberty to renew the said commission, and to make the same returnable without delay.

And your Petitioner shall ever pray, &c.

Petition to add an Interrogatory or two, but not to examine any Witnesses already examined.

In Chancery.

Between *A. B.* Plaintiff.
C. D. Defendant.

To the Right Honourable, &c.

The humble petition of the Plaintiff.

Sheweth,

That your petitioner obtained an order for a commission to examine witnesses returnable and accordingly examined several witnesses, and returned his commission; but before publication past, the defendant obtained an order for a commission to examine witnesses this vacation, and your petitioner has joined and struck commissioners names for that purpose, but no notice is yet given of executing the said commission.

That your petitioner is advised it is necessary to add an interrogatory or two, to his former schedule of interrogatories.

Your petitioner therefore humbly prays your Honour, that he may be at liberty to add an interrogatory or two, to his former schedule of interrogatories, but so as not

to examine any witness, that hath already
been examined.

And your Petitioner shall ever pray, &c.

*Petition to be at Liberty to exhibit one or more Interrogatories to
prove Accounts after Publication passed.*

In Chancery.

Between *A. B.* Plaintiff.

C. D. Defendant.

To the Right Honourable the Master of the Rolls.

The humble Petition of the Defendant.

Sheweth,

That publication being duly passed, this cause was set
down for hearing before your Honour.

Forasmuch as your petitioner is advised to prove the
execution or signing of five different accounts, purport-
ing to be accounts of the *Spurn* lights.

Your petitioner therefore humbly prays your
Honour, that he may be at liberty to
examine one or more witnesses to prove
the same, and to exhibit one or more in-
terrogatories for that purpose.

And your Petitioner shall ever pray, &c.

*Petition of Defendant to examine in Term Time, not being
prayed by the Order for the Commission to examine Wit-
nesses.*

Between *A. B.* Plaintiff.

C. D. Defendant.

To the Right Honourable the Master of the Rolls.

The humble Petition of the Defendant.

Sheweth,

That on _____ last, your petitioner obtained
an order for a commission to examine witnesses, in which
the plaintiff joined, and your petitioner has since sued
out the same, but did not thereby pray to be at liberty to
execute the same in term time.

Your petitioner therefore humbly prays your
Honour, that he may be at liberty to
execute the said commission in term time.

And your Petitioner will ever pray, &c.

*Petition to examine a Defendant at the Execution of a Com-
mission to examine Witnesses.*

Between *A. B.* Plaintiff.

C. D. and others, Defendants.

To the Right Honourable, the Master of Rolls.

The humble Petition of the Plaintiff.

Sheweth,

That issue being joined, a commission has issued for the
examination of witnesses in this cause, and your petitioner
is

is advised that the said defendant *C. D.* is a very material witness for your petitioner, and forasmuch as she is in no wise concerned in point of interest

Your petitioner humbly prays your Honour, that he may be at liberty to examine the said defendant *C. D.* at the examination of the said commission, as a witness for your petitioner, saving just exceptions. And your Petitioner will ever pray, &c.

Petition to examine a Defendant.

In Chancery.

Between *A. B.* Plaintiff.
C. D. and *E. F.* Defendants.

To the Right Honourable, &c.

The humble petition of the Plaintiff.

Sheweth,

That issue being joined in this cause, your petitioner is advised, that the said defendant *E. F.* is a very material witness for your petitioner, and forasmuch as he is no way concerned in point of interest

Your petitioner therefore most humbly prays your Honour, that he may be at liberty to examine the said defendant *E. F.* at the examination of witnesses in this cause, as a witness for your petitioner, saving just exceptions.

And your Petitioner shall ever pray, &c.

Petition to enlarge Publication.

In Chancery.

Between *A. B.* Complainant.

C. D. Defendant.

To the Right Honourable, &c.

The humble Petition of the Plaintiff.

Sheweth,

That on the instant, a rule was entered by the defendant's clerk in court, for passing publication in this cause, which rule is not yet expired.

That your petitioner has not yet been able to examine any witnesses, though he has several material witnesses, (as he is advised,) to examine in this cause, without whose testimony, he cannot safely proceed to a hearing.

Your petitioner therefore most humbly prays
your Honour, that publication in this cause
may be enlarged till the first day of the
next term.

And your Petitioner shall ever pray, &c.

Petition to enlarge Publication.

In Chancery.

Between *A. B.* Plaintiff.

C. D. Defendant.

To the Right Honourable, &c.

The humble Petition of the Defendant.

Sheweth,

That this cause being at issue, several witnesses have been examined on the part of the plaintiff, and this day being

being the day of a rule is entered
by the plaintiff's clerk in court, for passing publication
in this cause.

That by reason of your petitioner's, and his solicitor's
illness, your petitioner has not been able to examine his
witnesses this vacation, although he hath several very
material witnesses, (as he is advised) to examine, and in
regard your petitioner hath no intention to postpone the
setting down this cause for hearing.

Your petitioner therefore humbly prays your
Honour, that publication in this cause
may be enlarged for a month.

And your Petitioner shall ever pray, &c.

Petition to enlarge Publication.

In Chancery.

Between *Samuel Sadler* Plaintiff.

Henry Williamson Defendant.

To the Right Honourable, &c.

The humble Petition of the Defendant.

Sheweth,

That a commission has been executed in this cause, and
is returnable,—since which the plaintiff hath given a
rule to publish, but the same is not yet expired, and for-
asmuch as your petitioner hath several material witnesses,
to examine in this cause, who live in and about the city
of *London*.

Your petitioner therefore most humbly prays
your Honour, that publication in this cause
may be enlarged for a fortnight.

And your Petitioner shall ever pray, &c.

N n 2

Petition

Petition to enlarge Publication, so as not to hinder setting down the Cause, and for an original and cross Cause to come on together.

Between *Henry Williamson* Plaintiff.

Henry Kensit, Defendant.

And the said *Henry Kensit*, Plaintiff.

And the said *Henry Williamson*, Defendant

To the Right Honourable, &c.

The humble Petition of, &c.

Sheweth,

That these causes being at issue, commissions were taken out and executed, and witnesses examined thereupon in the last long vacation.

That your petitioner (the plaintiff, in the original cause, the twenty-first instant, caused a rule to be given for passing publication in the original cause, but having several material witnesses, (as he is advised,) still to examine, and your petitioner having consented and agreed to the several matters contained in the prayer of this petition, your petitioner's clerks in court having subscribed their names, testifying such consent.

Your petitioner therefore most humbly prays your Honour, that publication may be enlarged in the original cause, until the first general seal, after this term, and that publication may then pass in both causes, so as not to hinder the plaintiff in the original cause, from setting down the same, for hearing this term, and that the plaintiff, in the cross cause, may be at liberty to set down his cause, to be heard at the same time.

And your Petitioner shall ever pray, &c.

Petition

Petition to enlarge Publication, and for a Commission to examine Witnesses.

Between *A. B.* Plaintiff.

C. D. Defendant.

To the Right Honourable, &c.

The humble Petition of the Defendant.

Sheweth,

That the plaintiff has given rules to produce witnesses, and to pass publication, as of the last term, but has not examined any witnesses.

That your petitioner hath several very material witnesses, (as he is advised) to examine in this cause, without whose testimony he cannot safely proceed to a hearing, and forasmuch as your petitioner lives in, &c.

Your petitioner therefore most humbly prays your Honour, that publication in this cause may be enlarged, until the first day of the next term, and that your petitioner may have a commission for examination of witnesses, and that the plaintiff's clerk in court may join, and strike commissioners names, with your petitioner's clerk in court, in four days after notice to the plaintiff's clerk in court, or that in default thereof, your petitioner may be at liberty to take out a commission this vacation, directed to his own commissioners.

And your Petitioner shall ever pray, &c.

Petition for a Commission to examine Witnesses after Cause set down.

Between *A. B.* Plaintiff.

C. D. Defendant.

To the Right Honourable, the Master of the Rolls,
The Plaintiff's humble Petition.

Sheweth,

That this cause being at issue, and your petitioners apprehending it was not necessary to examine any witnesses, and no witnesses being examined for the defendants, publication was duly passed, and the cause set down for hearing, and for that this application is in your petitioner's own delay.

That your petitioners are now advised 'tis necessary to prove the execution of several deeds, and the witnesses thereto live in the country.

Your petitioners therefore humbly pray your Honour, that they may have a commission to examine witnesses in the country, returnable without delay, and that the defendant's clerk in court may in four days after notice hereof, join and strike commissioners names with your petitioner's clerk in court, or in default thereof, that your petitioners may have such commission directed to their own commissioners,

And your Petitioners shall ever pray, &c.

Petition to serve a Subpœna to hear Judgment on a Clerk in Court, Defendant absconding.

In Chancery.

Between *A. B.* Plaintiff.
C. D. and others, Defendants.

To the Right Honourable, &c.

The humble Petition of the Plaintiff.

Sheweth,

That your petitioner's cause being set down to be heard, on the day of next ensuing, *subpœnas* to hear judgment have been issued and served on all the defendants, except the defendant *C. D.* and the said defendant *C. D.* absconding, and concealing himself, so that your petitioner is not able to serve him with a *subpœna* to hear judgment, in this cause, as by the affidavit annexed appears.

Your petitioner therefore most humbly prays your Honour, that service of the said *subpœna* to hear judgment on the said defendant *C. D.*'s clerk in court may be deemed good service on the said defendant.

And your Petitioner shall ever pray, &c.

Petition to prove an Exhibit vivâ voce at the Hearing.

In Chancery.

Between *A. B.* Plaintiff.
C. D. Defendant.

To the Right Honourable, &c.

The humble Petition of the Plaintiff.

Sheweth,

That this cause being set down to be heard before your Honour, your petitioner is advised, it will be necessary

Petitions.

for him to prove at the hearing thereof, a certain bond bearing date the day of entered into by the said defendant to your petitioner, in the penalty of 1000*l.* conditioned for the payment of 500*l.* with interest.

Your petitioner therefore most humbly prays your Honour, that he may be at liberty at the hearing of this cause, to examine one or more witness or witnesses, *viva voce*, to prove the said bond.

And your Petitioner shall ever pray, &c.

Petition that an Answer taken in one Cause, may be read and made use of, at the hearing of another Cause.

In Chancery.

Between *A. B.* Plaintiff.

C. D. Defendant.

To the Right Honourable, &c.

The humble Petition of the Defendant.

Sheweth,

That your petitioner having exhibited his bill in this honourable court, against the now plaintiff, for a discovery of his right and title to the several premises in question, in this cause, to which the now plaintiff put in his answer.

Your petitioner therefore most humbly prays your Honour, that he may be at liberty to read, and make use of the now plaintiff's answer, put in to your petitioner's said bill, at the hearing of this cause.

And your Petitioner shall ever pray, &c.

Petition

Petition that Depositions in one Cause may be read and made use of at the Hearing of another Cause.

In Chancery.

Between *A. B.* Plaintiff.

C. D. Defendant.

To the Right Honourable, &c.

The humble Petition of the Defendant.

Sheweth,

That one *Mr. H. J.* a mortgagee of the premises in question in this cause, having some time heretofore exhibited his bill to foreclose in this honourable court, against your petitioner and the now plaintiff, and issue being thereupon joined, several witnesses were examined in the said cause.

Your petitioner therefore most humbly prays your Honour, that he may be at liberty at the hearing of this cause, to read and make use of the depositions taken in the said cause, saving all just exceptions.

And your Petitioner shall ever pray, &c.

Petition for leave to examine Witnesses after Publication upon the usual Affidavit.

In Chancery.

Between *A. B.* Plaintiff.

C. D. Defendant.

To the Right Honourable, &c.

The humble Petition of the Plaintiff.

Sheweth,

That publication in this cause is passed, and the cause is set down for hearing before your Honour, but your petitioner

tioner having several material witnesses to examine, without whose evidence he cannot safely proceed to a hearing, and your petitioner, his clerk in court, and solicitor not having seen or inspected the depositions taken in this cause, or otherwise published, or caused to be published the same, as by the affidavit annexed appears.

Your petitioner therefore most humbly prays your Honour, that publication in this cause may be enlarged for a fortnight, and the cause adjourned for that time.

And your Petitioner shall ever pray, &c.

For the form of an affidavit to be annexed to this petition, *vide* affidavits.

Petition that Deposition may be opened, published, copied and sealed up again.

In Chancery.

Between J. C. Plaintiff,
G. G. and H. H. Defendants.

To the Right Honourable the Lord High
Chancellor of Great Britain.

The humble Petition of the Plaintiff.

Sheweth,

That your petitioner filed his bill in this honourable court against the said defendants, and obtained an order to examine witnesses *de bene esse*, and several were examined by commission in the country accordingly, and particularly one *James Haines* was examined by your petitioner, and cross examined by defendant *G. G.* on such commission, which said *James Haines* is since dead, and the said defendant having brought an action against your petitioner, for [set out nature of action] for the trial whereof at the Sittings
after

after this present *Easter Term*, in his Majesty's Court of *King's Bench*, for the City of *London*, notice is given.

Your petitioner therefore most humbly prays your Lordship, that the said commission may be opened by the clerks in court for plaintiff and for defendant *G. G.* and that the deposition of the said *James Haines*, on his original and cross examination may be published, copied and examined, and then the said commission and depositions be closed and sealed up again, by said clerks in court under their hands and seals.

And your Petitioner will ever pray, &c.

I consent to the prayer of the above petition, if your Lordship shall think fit to order the same.

F. D.

Petition to set down a Plea to be argued.

In Chancery.

Between *A. B.* Plaintiff.
C. D. and others, Defendants.

To the Right Honourable the Lord High
Chancellor of *Great Britain*.

The humble Petition of the Defendant *C. D.*

Sheweth,

That in Term last, the plaintiff filed his bill in this honourable court against your petitioner and others, since which he has thought fit to amend the same.

That

tioner having several material witnesses to examine, without whose evidence he cannot safely proceed to a hearing, and your petitioner, his clerk in court, and solicitor not having seen or inspected the depositions taken in this cause, or otherwise published, or caused to be published the same, as by the affidavit annexed appears.

Your petitioner therefore most humbly prays your Honour, that publication in this cause may be enlarged for a fortnight, and the cause adjourned for that time.

And your Petitioner shall ever pray, &c.

For the form of an affidavit to be annexed to this petition, *vide* affidavits.

Petition that Deposition may be opened, published, copied and sealed up again.

In Chancery.

Between J. C. Plaintiff,
G. G. and H. H. Defendants.

To the Right Honourable the Lord High
Chancellor of Great Britain.

The humble Petition of the Plaintiff.

Sheweth,

That your petitioner filed his bill in this honourable court against the said defendants, and obtained an order to examine witnesses *de bene esse*, and several were examined by commission in the country accordingly, and particularly one *James Haines* was examined by your petitioner, and cross examined by defendant G. G. on such commission, which said *James Haines* is since dead, and the said defendant having brought an action against your petitioner, for [set out nature of action] for the trial whereof at the Sittings after

after this present *Easter* Term, in his Majesty's Court of *King's Bench*, for the City of *London*, notice is given.

Your petitioner therefore most humbly prays your Lordship, that the said commission may be opened by the clerks in court for plaintiff and for defendant *G. G.* and that the deposition of the said *James Haines*, on his original and cross examination may be published, copied and examined, and then the said commission and depositions be closed and sealed up again, by said clerks in court under their hands and seals.

And your Petitioner will ever pray, &c.

I consent to the prayer of the above petition, if your Lordship shall think fit to order the same.

F. D.

Petition to set down a Plea to be argued.

In Chancery.

Between *A. B.* Plaintiff.
C. D. and others, Defendants.

To the Right Honourable the Lord High
Chancellor of *Great Britain*.

The humble Petition of the Defendant *C. D.*

Sheweth,

That in Term last, the plaintiff filed his bill in this honourable court against your petitioner and others, since which he has thought fit to amend the same.

That

That in _____ your petitioner, put in his plea and answer to the said amended bill, which plea the plaintiff hath not yet set down to be argued.

Your petitioner therefore humbly prays your Lordship, that he may be at liberty to set down his plea to be argued, and that your Lordship would be pleased to appoint a day for the arguing thereof.

And your Petitioner shall ever pray, &c.

Pctition to set down Demurrer to be agreed.

In Chancery.

Between *A. B.* Plaintiff,
C. D. Defendant.

To the Right Honourable the Lord High
Chancellor of *Great Britain*.

The humble Petition of the Plaintiff.

Sheweth,

That your petitioner having filed his bill against the defendant to which he appeared, and hath put in a demurrer and answer thereto.

Your petitioner therefore humbly prays your Lordship, that the said demurrer may be set down before your Lordship, next after the pleas and demurrers already appointed.

And your Petitioner shall ever pray, &c.

Petition to set down Exceptions to a Master's Report.

In Chancery.

Between *A. B.* Plaintiff.
C. D. Defendant.

To the Right Honourable the Lord High
Chancellor of *Great Britain*.

The humble Petition of the Plaintiff.

Sheweth,

That your petitioner hath lately filed exceptions to the report of *Mr. K.* one of the Masters of this Court, made in this cause, bearing date the day of last past, and deposited five pounds, as by the Register's certificate hereunto annexed appears.

Your petitioner therefore most humbly prays
your Lordship, to appoint a short day for
the arguing of the said exceptions.

And your Petitioner shall ever pray, &c.

Petition to set down a Cause for hearing.

In Chancery.

Between *A. B.* Plaintiff.
C. D. Defendant.

To the Right Honourable, &c.

The humble Petition of the Plaintiff.

Sheweth,

That publication is by order, bearing date the
day of to pass in this cause the first day of next
term,

term, and your petitioner by the same order is to procure the said cause to be set down to be heard some time within the said term.

Your petitioner therefore humbly prays your Honour, that this cause may be set down in the paper of causes, for the last day of causes within the next term.

And your Petitioner shall ever pray, &c.

Petition to set down a Cause for farther Directions on a Master's Report.

In Chancery.

Between *A. B.* Plaintiff.
C. D. Defendant.

To the Right Honourable, &c.

The humble petition of the Defendant.

Sheweth,

That on the hearing of this cause, on the day of
1784, it was ordered and decreed [*as in the decree*] and after the said Master should have made his report, such farther order should be made therein as should be just.

That in pursuance thereof the said Master hath made his report, bearing date, the day of last past, in relation thereto.

Your petitioner therefore most humbly prays your Lordship, to appoint a short day for the hearing of this cause on the said Master's report.

And your Petitioner shall ever pray, &c.

Petition

Petition to adjourn a Cause.

In Chancery.

Between *A. B.* Plaintiff.

C. D. Defendant.

To the Right Honourable the Master of the Rolls.

The humble Petition of the Plaintiff.

Sheweth,

That this cause stands 40th in your Honour's paper for hearing, and no briefs are delivered on either side.

And forasmuch as your petitioner is advised by his counsel, it is necessary to file a supplemental bill against the defendant, who have within a few days taken out an administration to a person who had an interest, and ought to have been a party to the suit.

Your petitioner therefore humbly prays your Honour, that this cause may be adjourned to the first day of causes in *Trinity Term* next.

And your Petitioner shall ever pray, &c.

Petition to set down a Cause for rehearing on Defendant's Default of Appearance at the Hearing.

In Chancery.

Between *A. B.* Plaintiff.

C. D. Defendant.

To the Right Honourable the Master of the Rolls.

The humble Petition of Defendant.

Sheweth,

That this cause came on to be heard the _____ day
of _____ last, and your petitioner not attending,
your

your Honour made the usual decree, and your petitioner being willing to pay to the plaintiffs the costs of that day's attendance, whenever the plaintiff's clerk in court shall think fit to deliver your petitioner a bill of the same.

Your petitioner therefore most humbly prays your Honour to appoint some short day for the hearing of this cause, as to your petitioner.

And your Petitioner shall ever pray, &c.

Petition to bring on two Causes to be heard together.

In Chancery. Between *A. B. C. D.* and *E. F. G. H.*

To the Right Honourable the Lord High
Chancellor of Great Britain.

The humble Petition of the said *E. F.*

Sheweth,

That both these causes are set down for hearing, before your Lordship, and that the cause *A. B.* and *C. D.* stands and the cause *E. F.* and *G. H.* stands in your Lordship's paper of causes.

That both these causes relate to each other, and are proper to be heard together.

Your petitioner therefore humbly prays your Lordship, that the said cause *E. F.* and *G. H.* may be brought up to the cause *A. B.* and *C. D.* so that both may be heard together, and the depositions taken in the cause *A. B.* and *C. D.* may be read at the hearing of your petitioner's cause.

And your Petitioner shall ever pray, &c.

N. B. Double Fees are paid on answering this Petition.

Petition

Petition to restore a Cause, after struck out of the Paper to be done the same or the next Day.

In Chancery.

Between *A. B.* Plaintiff.

C. D. Defendant.

To the Right Honourable the Master of the Rolls.

The Plaintiff's humble Petition.

Sheweth,

That this cause was in the paper for hearing, before your Honour, this instant, your petitioner's counsel not being present, the same was struck out.

Your petitioner therefore humbly prays your Honour, that this cause may be restored to its place in your Honour's paper of causes.

And your Petitioner shall ever pray, &c.

Petition to set down Cause on the Equity reserved after Issue at Law.

In Chancery.

Between *A. B.* Plaintiff.

C. D. Defendant.

To the Right Honourable the Lord High Chancellor of Great Britain.

Sheweth,

That this cause was heard before your Lordship, the 15th day of *July* last, when it was ordered that the parties should proceed to a trial at law, at the next assize for the

O o

county

county of upon the following issue, *devisevit vel non*, on the will of *Elizabeth Swinnerton* deceased, dated the first day of *February*, 1762. and that the plaintiff in this court should be plaintiff at law, and the defendant *Swinnerton* defendant at law with all usual directions. And that the defendant *J. C.* should be at liberty to attend by counsel on the trial of the said issue, and your Lordship reserved the consideration of this suit, and of all further directions, until after such trial.

That the said issue was tried at the last assizes for the county of and a verdict found for your petitioner.

Your petitioner therefore humbly prays your Lordship, that this cause may be set down on the equity reserved by the said decree. And that your Lordship will appoint a short day for the hearing thereof.

And your Petitioner will pray, &c.

Petition to set down special Matter upon the Master's Report.

In Chancery.

Between *A. B.* Plaintiff.

C. D. Defendant.

To the Right Honourable the Lord High Chancellor
of Great Britain.

The humble petition of the Plaintiff.

Sheweth,

That the said testator, having devised his real and personal estates, to the said defendants, and to deceased, to be sold for payment of his debts, and legacies. This bill was brought, to have the same sold accordingly, with the approbation of Mr. one of the Masters of this honourable court, to whom the said cause stood referred. That the said several estates were

after-

afterwards sold before the said Master, and Mr:
being reported the best purchaser of a share in the navigation of the river *Avon* at *Bath*, (part of the said estate,) at 540*l.* and being willing to proceed therein, but some disputes having arisen, relating to the said title to the said share

It was referred to the said Master, to enquire, whether a good title could be made to the said share or not, and the said Master made his report thereof pursuant to the said order, and hath thereby stated the same specially.

Your petitioner therefore most humbly prays
your Lordship will be pleased to appoint
some short day for hearing of the special
matter of the Master's said report.

And your Petitioner shall ever pray, &c.

Petition to set down a Cause on the Equity reserved by the Decree.

In Chancery.

Between *A. B.* Plaintiff.

C. D. Defendant.

The humble Petition of the Plaintiff,

Sheweth,

That by an order made in this cause, the day of
an issue *deviseavit vel non*, was directed upon the
will of *E. S.* to be tried at the assizes at

That by virtue of different orders, such issue being
tried three times, and verdicts found in favour of the will
of the said *E. S.*

Your petitioner therefore humbly prays your
Lordship, that this cause may be set down,
to be heard before your Lordship, on the
equity reserved by the said decree.

And your Petitioner shall, &c.

*Petition to set down Cause on the Equity reserved on a Case
for the Opinion of the Judges of K. B.*

Between *A. B.* and *C. D.* Plaintiffs.
L. S. M. S. Widow.
and *I. F.* Defendant.

To the Right Honourable the Lord High Chancellor
of Great Britain.

The humble Petition of *I. S.* and *M. S.*

Sheweth,

That by the decree made on the hearing of this cause, it was ordered that a case should be made for the opinion of the judges of the court of King's Bench, and that the question should be, what estate *W. S.* took under the will of *S.* his father, dated the 7th day of *May* 1731. and it was ordered that all facts necessary to bring the matter into question should be stated in the case, and it was referred to master *M.* to settle the same, in case the parties differed. And it was further ordered, that the judges of the said court should be attended with the said case, and the consideration of costs, and all further directions were reserved until after the judges of the court of King's Bench should have made their certificate.

That in pursuance of the said decree, a case was settled, and came on to be argued in *Hilary* term last, before the judges of the court of King's Bench, who have certified, that having heard counsel, and considered the case, they were of opinion that *W. S.* took under the above will of *S.* an estate for life, not merged by the devise to the heirs of his body, but by that devise an estate-tail in remainder vested in the said *W. S.*

Your

Petitions.

565

Your petitioner therefore humbly prays your Lordship, that this cause may be set down to be heard before your Lordship on the equity reserved.

And your Petitioner will ever pray, &c.

Petition to refer an Examination to a Master, and to tax Costs upon the Breach of an Order.

In Chancery.

Between *A. B.* Plaintiff.

C. D. Defendant.

To the Right Honourable the Master of the Rolls.

The humble Petition of the Plaintiff.

Sheweth,

That the defendant having been examined on interrogatories touching a contempt laid to his charge for breach of an order of this court of the day of
last, your petitioner hath examined witnesses for proof thereof.

Your petitioner humbly prays your Honour, that it may be referred to a Master of this court, to consider of the said examination, and depositions, and to certify whether the defendant hath committed the contempt laid to his charge, and to tax costs according to the general order in that behalf.

And your Petitioner shall ever pray, &c.

Petition for a Return of a Writ of Inquiry.

In Chancery,

Between *A. B.* Plaintiff.*C. D.* Defendant,

To the Right Honourable the Master of the Rolls,

The humble Petition of the Defendant.

Sheweth,

That your petitioner was this day served with the injunction of this court, to stay his proceedings at law for the matters here in question with the usual clause of liberty in default of a plea to enter up judgment, with stay of execution.

That there being default of a plea, your petitioner signed interlocutory judgment, and a writ of inquiry issued, and was long since delivered to the sheriff who executed the same this day.

That without a return of the writ, your petitioner cannot have a final judgment.

Your petitioner therefore humbly prays your Honour, that he may be at liberty to call for the return of the said writ, and to enter up a final judgment, he being willing to stay execution according to the said injunction.

And your Petitioner shall ever pray, &c.

Petition

Petition that Service of an Order nisi on the Clerks in Court may be good Service.

In Chancery.

Between *A. B.* Plaintiff.
C. D. Defendant.

To the Right Honourable, &c.

The humble petition of the Plaintiff.

Sheweth,

That by the decree made on hearing of this cause the day of 1784. it was referred to Mr. T——. one of the Masters of this court, to compute what was due to your petitioner for principal, interest, and costs, for the sum of 500*l.* secured to your petitioner, on the premises in question, in this cause.

That the said Master, by his report dated the day of 1785. certified to be due to your petitioner, (on his said security) the sum of 700*l.* for his principal, interest and costs, and your petitioner having on the day of 1785. obtained an order of this court, to confirm the said report (unless cause) he has not been able to get the said order served upon the said several defendants, by reason the said defendants are many in number, live at a great distance from each other, as by the affidavit annexed appears.

Your petitioner therefore most humbly prays your Honour, that service of the said order on the several clerks in court, (who are concerned for the said several defendants in this cause) may be deemed good service on the said several defendants.

And your Petitioner shall ever pray, &c.

Q o 4

Petition

Petition that serving Writ of Execution on Clerk in Court of absconding Defendant, may be good Service on him.

In Chancery.

Between *A. B.* Plaintiff.

C. D. Defendant.

To the Right Honourable the Master of the Rolls.

The humble Petition of the Plaintiff.

Sheweth,

That by a decretal order made on hearing this cause, it was referred to a Master to take an account of all dealings and transactions, between your petitioner and defendant; and that what the Master should find to be due on balance, should be paid accordingly.

That Master by his report dated certified there was due from defendant to your petitioner on balance of the aforesaid account, the sum of

That by an order dated said report was confirmed, unless cause, and an affidavit of defendant secreting himself, by your Honour's order, dated It was ordered that service of the last mentioned order on defendant's clerk in court should be good service, and by order of said report was absolutely confirmed.

That in order to enforce obedience to the said decree on the day of your petitioner caused a writ of execution of said decretal, and other orders, and Master's report to be sealed, and from that time to this, hath used repeated endeavours to serve defendant therewith, but he so secretes himself, that your petitioner hath not been able so to do, as by affidavit annexed appears.

Your petitioner therefore most humbly prays
your Honour, that leaving a copy of said
writ

Petitions.

569

Writ of execution, at defendant's house, together with service thereof on his clerk in court, may be deemed good service on said defendant.

And your Petitioner will ever pray, &c.

Petition to enter a Decretal Order nunc pro tunc.

In Chancery.

Between *A. B.* Plaintiff.

C. D. Defendant.

To the Right Honourable the Master of the Rolls.

The humble Petition of

Sheweth,

That upon the hearing of this cause, the day of a decree was pronounced, which has since been drawn up, and passed by the register, but the time for entering the same being elapsed by the rules of the court.

Your Petitioner therefore humbly prays your Honour, that the said decretal order may be entered, *nunc pro tunc*.

And your Petitioner shall ever pray, &c.

Petition to sign and inrol a Decree, nunc pro tunc.

In Chancery.

Between *A. B.* Plaintiff.

C. D. Defendant.

To the Right Honourable the Master of the Rolls.

The humble Petition of the Plaintiff.

Sheweth,

That the time for signing and inrolling the decree in this cause is elapsed according to the strict rules of the court,

Your

Your petitioner therefore humbly prays your Honour that he may be at liberty to sign and enrol the said decree, *nunc pro tunc*.
And your Petitioner shall ever pray, &c.

Petition to enlarge Time for Payment of Money.

In Chancery.

Between *A. B.* Plaintiff.
C. D. Defendant.

To the Right Honourable the Master of the Rolls.

The Humble Petition of

Sheweth,

That on the last your Honour was pleased to order your petitioners, to bring into this court, the sum of within a fortnight then next, and thereupon, the injunction to be continued to the hearing. That the matter arising in your petitioners have not been able to get the same money returned, but the defendant having three several judgments for each against your petitioners on bail bonds, they have very good security, and your petitioners shall speedily get the money returned, and paid into court.

Your petitioner therefore humbly prays your Honour, to enlarge the time for bringing the said money into court, till the instant, and to stay all proceedings in the mean time.

And your Petitioner shall ever pray, &c.

Petition for an Infant Trustee to convey, pursuant to Stat. 7. Ann,

To the Right Honourable, &c.

The humble Petition of *M. C. Widow*, and
Administatrix of *I. C. Esq;* deceased.

Sheweth,

That by indentures of lease and release, bearing date the 26 and 27 days of *July*, 1775. the said release being tripartite, and made between *Jervase Jones*, of *Offley* in the County of *Hertford* Clerk, of the first part, *John Shepherd*, and *Dame Elizabeth Salusbury*, (of the same place) of the second part, and your petitioner's said late husband by the name and description of *I. C.* of, &c. of the third part, reciting as therein is recited, and that for the consideration therein metioned, the said *Jervase Jones* did grant release, and convey, and the said *John Shepherd*, and *Dame Elizabeth Salusbury*, did ratify and confirm unto the said *I. C.* all, &c. to hold unto the said *I. C.* his heirs and assigns, subject to a condition, or proviso, for redemption on payment of the principal sum of 800*l.* and interest by the said *John Shepherd* and *Dame Elizabeth Salusbury*, or either of them, their or either of their heirs, executors, administrators or assigns to the said *I. C.* his heirs, and assigns, on the 27th day of *December* then next.

That the said money was not paid according to the said proviso or condition, and there now remains justly due, and owing to the estate of the said *I. C.* upon the said mortgage, the said sum of 800*l.* with an arrear of interest.

That the said *I. C.* the mortgagee, is lately dead intestate, leaving *I. C.* his son and heir at law, an infant, under the age of 21 years, and your petitioner being the
widow

widow of the said *I. C.* deceased, hath duly obtained letters of administration of his personal estate, and is thereby, amongst other things, become intitled to the principal money, and interest, now remaining due on the said mortgage.

That your petitioner is advised, that the said *I. C.* the infant, is a trustee of the legal estate of the said mortgage, for the benefit of your petitioner, and enabled to convey within the intent and meaning of the statute made in the seventh year of her late majesty queen *Anne*, intitled, an act to enable infants who are seized, or possessed of estates in fee, in trust, or by way of mortgage, to make conveyances of such estates.

Your petitioner therefore humbly prays your Honour will be pleased, to order the said *I. C.* the infant, to convey his legal estate in the said mortgaged premises, to your petitioner, or as she shall direct, or that your Honour will make such other order to your petitioner's relief as to your Honour shall seem meet.

And your Petitioner, &c.

Petition for a Person come of Age, to enlarge Time for shewing Cause against a Decree.

Between *A. B.* Plaintiff.

C. D. Defendant.

To the Right Honourable the Master of the Rolls.

The humble Petition of the Defendant.

Sheweth,

That upon hearing this cause before your Honour, the day of 1780. your petitioner being

3

then

then an infant, it was, (amongst other things) decreed, that in default of your petitioner's paying what should be certified due to the plaintiff, for principal, interest, and costs, on the mortgaged premises in question, at such time, and place as the Master should appoint, that then your petitioner might be absolutely foreclosed of all equity of redemption to the same, unless your petitioner (being the heir at law) upon service of a *subpœna* for that purpose, should within six months after he attains his age of twenty-one years, shew good cause, to the contrary.

That your petitioner, about three months since, attained his age of twenty-one years, and hath been served with a *subpœna* accordingly.

That by reason of the vacation, your petitioner cannot apply to shew cause against the said decree, (if he should be advised so to do) and for that, the plaintiff cannot be a sufferer, being in possession of the premises;

Your petitioner therefore most humbly prays your Honour, that he may have till the end of the next term, to shew cause against the said decree, and that in the mean time, the said plaintiffs may be stayed from making the said decree absolute, against your petitioner.

And your Petitioner will ever pray, &c.

Petition for a Solicitor to deliver his Bill and to tax the same.

In Chancery.

Between *A. B.* Plaintiff.

C. D. Defendant.

To the Right Honourable the Master of the Rolls,

The humble Petition of the Defendant.

Sheweth,

That your petitioner having employed Mr. *I. B.* one of the solicitors of this honourable court, to defend this suit
for

for your petitioner, and also employed him in divers suits at law, and in other matters, as your petitioner's solicitor and attorney.

That the said Mr. *I. B.* hath, from time to time, in the course of his transacting your petitioner's business, as an attorney, and solicitor as aforesaid, got into his hands, and received divers sums of money to a considerable amount, belonging to your petitioner, and much more than sufficient, (as your petitioner apprehends,) to pay, and satisfy his bill of fees, and disbursements.

That your petitioner hath frequently applied to, and requested the said Mr. *I. B.* to make out his said bill of fees, and disbursements, and deliver the same to your petitioner together with all deeds, papers, writings, and vouchers belonging to your petitioner, which the said Mr. *I. B.* hath hitherto declined to do.

That your petitioner is willing and desirous, and hereby submits to pay to the said Mr. *I. B.* what, (if any thing,) shall appear to be due to him, on the taxation of his said bill of fees and disbursements.

Your petitioner therefore prays your Honour that the said Mr. *I. B.* may in a fortnight after notice hereof, deliver to your petitioner a bill of all such fees and disbursements, as he claims to be due to him in this and all other causes and matters wherein he has been employed as solicitor or attorney for your petitioner, and that it may be referred to one of the Masters of this honourable court, to tax such bill, and that the said Mr. *I. B.* may produce before the said Master, on oath, as the said Master shall direct all papers, and writings in his custody or power relating to such bill, or any of the items or charges therein, and that he may be examined

amined upon interrogatories, touching the same, and otherwise as the Master shall direct. And that upon your petitioner paying the said Mr. *I. B.* what shall appear to be due to him, on taxation of the said bill, or in case such bill shall appear to be already paid, he may deliver to your petitioner on oath, all deeds, papers and writings in his custody, on power belonging to your petitioner. And if it shall appear that such bill is over-paid, that the said Mr. *I. B.* may refund, and pay unto your petitioner what shall appear to have been over-paid.

And your Petitioner shall ever pray, &c.

Petition to tax Solicitor's Bill delivered.

In Chancery.

Between *A. B.* Plaintiff.

C. D. Defendant.

To the Right Honourable the Master of the Rolls.

The humble Petition of the Plaintiff.

Sheweth,

That your petitioner employed Mr. *A. B.* one of the solicitors of this court, to prosecute this suit, and to prosecute and defend divers other suits, as your petitioner's solicitor.

That the said *A. B.* hath delivered unto your petitioner a bill of his fees, and disbursements, in which your petitioner is advised, there are many extravagant over-charges.

That your petitioner hath at divers times, paid the said *A. B.* several sums of money on account of his said bill, which your petitioner apprehends, amount to much more than what would be coming due to the said *A. B.* on a fair taxation of his said bill.

That

That your petitioner is willing, and doth hereby submit to pay the said *A. B.* what (if any thing) shall appear to be due to him on the taxation of his said bill.

Your petitioner therefore most humbly prays your Honour, that it may be referred to one of the Masters of this honourable court, to tax the said bill. And that the said *A. B.* may produce before the Master, upon oath, as the Master shall direct, all papers, and writings, in his custody, or power relating to his said bill, or any of the items or charges therein, that he may be examined upon interrogatories touching the same, and otherwise as the Master shall direct, and that upon your petitioner's paying the said *A. B.* what shall appear to be due to him, on the taxation of the said bill, he may deliver unto your petitioner upon oath, all deeds, papers, and writings in his custody, or power, belonging to your petitioner, and if it appear the said bill is overpaid, that he may refund, and pay your petitioner what he is overpaid, and that all proceedings at law against your petitioner, on account of the said bill may be stayed until the Master shall have made his report.

And your Petitioner, &c.

To vacate Recognizance of Receiver and his Sureties.

In Chancery.

Between *A. B.* Plaintiff.

and

C. D. Defendant.

To the Right Honourable, &c.

The humble Petition of *C. K.*

Sheweth,

That by order made in this cause dated 10th *June* last, it was referred to Mr. *Pepys*, to appoint a receiver of the rents and profits of the testator's real estates, and pursuant thereto, the said Master appointed your petitioner receiver thereof.

That on the 15th day of *June*, your petitioner, together with *H. B.* and *B. K.* entered into a recognizance to the Right Honourable the Master of the Rolls, and *Peter Holford* Esq; then one of the Masters of this court, in the sum of 500*l.* each, conditioned for your petitioner's duly and annually accounting for what he should receive out of the rents and profits of the said estates, and answering and paying same, according to the directions of the court.

That your petitioner hath passed his accounts down to *Lady-day* last, and the said Master certified there then remained in your petitioner's hands, on the balance of his account the sum of *l.* which belonged to the defendant *C. D.*

That by an order made in this cause, dated 6th day of *July* last, it was ordered, that your petitioner should deliver to the defendant *C. D.* possession of so much of testator's real estate, as then remained unfold, and that he should pay to said *C. D.* the said sum of *l.* the balance remaining in your petitioner's hands as aforesaid, and thereupon he was to be discharged from the said receivership,

P p

and

and be at liberty to apply to the court to have the recognizance entered into by him, and his sureties vacated.

That possession of said testator's real estate then remaining unfold, hath been accordingly delivered to said *C. D.* and said balance of *l.* reported to be in the hands of your petitioners, hath also been paid to said *C. D.* pursuant to said order.

Your petitioner therefore prays your Honour, that the recognizance entered into, by your petitioner, and his said sureties, as aforesaid, may be vacated, and that the proper officer may attend your Honour with the record of the said recognizance for that purpose.

And your Petitioner will, &c.

Petition for further adjourning cause.

In Chancery.

Between *D. W.* Plaintiff.

C. M. his Wife, and others, Defendants.

To the Right Honourable the Master of the Rolls.

The humble Petition of the Plaintiff.

Sheweth,

That your petitioner having procured his cause to be set down to be heard before your Honour for *Easter* term last, your petitioner served all the defendants (except the defendant *C. M.*) with *subpœna* to hear judgment, but the said *C. M.* being a person very difficult to be met with, your petitioner could not serve him with *subpœna* to hear judgment, and thereupon your petitioner obtained an order, bearing date the 10th day of *May* last, to adjourn this cause to the 1st day of causes in *Easter* term next, and accordingly your petitioner took out another *subpœna* to hear judgment

udgment the 28th of this instant *April*, in hopes your petitioner should have been able to have served him therewith, but said *C. M.* having no settled place of abode, and being so very difficult to be met with, your petitioner hath not been able to serve him with the last mentioned *sub-pœna*, although your petitioner hath used all possible means for that purpose, and in regard the adjourning this cause is in your petitioner's own delay, and stands last in your Honour's paper for the day of causes in the ensuing term.

Your petitioner therefore most humbly prays your Honour, that this cause may stand further adjourned to the first day of causes in *Trinity* term next.

And your Petitioner shall ever pray, &c.

In causes where the Crown is interested, it is necessary to make the Attorney-general a party, and none of the King's counsel can be retained to plead against the Crown, without first obtaining an order from his Majesty for that purpose, which is done by petition in the following manner,

To the King's most excellent Majesty.

The humble Petition of *A. B.* and others,

Sheweth,

That your petitioners are plaintiffs in a cause in Chancery, wherein your Majesty's Attorney-general and others are defendants, That your petitioners have all along advised with your Majesty's Solicitor-general, and *T. C.* esquire, two of your Majesty's counsel learned in the law, but forasmuch as they cannot plead in the said cause, without your Majesty's royal licence to the said Mr. Solicitor-general and *T. C.* esquire, to be of counsel for them in the said cause.

Your Petitioners therefore humbly pray your Majesty will be graciously pleased to grant

Petitions.

your royal licence for the said Mr. Solicitor-general, and the said *T. C.* esquire, to be of counsel for your petitioners in the said cause, as often as there shall be occasion

And your Petitioner will ever pray, &c.

This petition is wrote upon unstamped paper, and carried to the office of one of the Secretaries of state.

Here follows the order upon the above petition.

Whereas *A. B.* &c. have by their petition humbly represented unto us, that they are plaintiffs in a cause in Chancery, wherein our Attorney-general and others are defendants, and that they all along have advised with our trusty and well beloved Solicitor-general and *T. C.* esquire, two of our counsel learned in the law. But sofar as they cannot plead for the petitioners in the said cause, without our royal licence dispensing therewith, they have therefore most humbly prayed us to grant our royal licence to our said Solicitor-general and *T. C.* to be of counsel for them in the said cause, we are graciously pleased to condescend to their request, and do accordingly hereby dispense with our said Solicitor-general and *T. C.* and give them power, licence and permission, to appear in the behalf of the said *A. B.* &c. to be of counsel for them in the said cause, as often as there shall be occasion.

Given at our court at *Saint James's*, the
day of 1785, in the twenty-fifth year
of our reign,

By his Majesty's command,

Sidney.

Solicitor-general and *T. C.* esquire,
licence to plead.

This order must be shewn to the counsel permitted to plead thereby, at the time their briefs are delivered.

Writ

Writ of Certiorari.

A *Certiorari* is a writ out of Chancery directed to an inferior court of record to remove and certify the record of a cause.

Two plaintiffs here sue for lands in the *County Palatine of Durham*; one of them lives in *Middlesex*, and the other is an old infirm man, and unable to follow the suit; therefore a *certiorari* was granted to the Chancellor of *Durham*, to certify the proceedings depending before him into this court. *Chan. Rep.* 68. (*Vide certiorari bills.*)

A writ of certiorari.

GEORGE the third, &c. To the Mayor and Aldermen of *London*, greeting. We willing, for certain causes, to be certified of and upon a certain petition or bill of complaint before you, against *C. D.* and *E. F.* at the suit of *A. B.* lately exhibited and now depending, commanding you that the petition or bill aforesaid, with all things touching the same, by whatsoever names the parties aforesaid, or any, or either of them, are or is set down, before us in our Chancery, truly, fully and exactly, as in your custody they now remain, under your seals distinctly and openly to send immediately, and this writ, that further thereof ye may cause to be done, that which of right ought to be done. Witness ourself at *Westminster* the day of in the year of our reign.

Sewell Winter.

Indorsed *By the Lord High Chancellor of Great Britain.*
T. C.

In the matter of C. D. and another.

P p 3

21 Feb.

21 Feb. 1784. This writ allowed by the court (*meaning the Lord Mayor's court.*)

The execution of this appears in a certain schedule annexed.

The answer of Sir _____, Knt. Lord Mayor, and the Aldermen of the City of London.

Birch, Clerk.

Writ of Injunction.

AN (*a*) injunction is a remedial writ in nature of a prohibition; to obtain which, the party's right or injury, applying for same, must be certified to the court. (*b*)

All injunctions are always obtained by order, upon motion, either upon matter confessed in the answer, or upon some matter of record, or on some deed, writing, or other evidence produced in court; except those injoining from committing waste, or cutting down trees, which may be granted in the long (*c*) vacation upon petition.

Injunction after answer is never obtained without giving two days notice thereof, in writing, to defendant's clerk in court, in order that he may, by his counsel, defend same, if he chuses so to do.

It may be obtained after answer and demurrer, on amended (*d*) bill: So it may where defendant cannot be found, to be served with a *subpœna*.

If injunction be granted on merits, or special cause of equity, the same commonly stands till the hearing, unless plaintiff delays his suit.

If defendant doth not appear in time, then you may draw and ingross an affidavit of serving the *subpœna*, and let it be sworn and filed; upon which you get an attachment issued for want of an appearance; and then you give instructions to counsel to move thereon for an injunction, which is granted of course.

(*a*) In order to procure injunction, an affidavit, verifying allegations of bill, is admitted to be read. Bunb. Rep. 35. pl. 54. will be granted for one defendant against another.

(*b*) 2 Vern. 276.

(*c*) See injunctions against waste, felling timber, &c.

(*d*) Gilb. Chan. 183.

But if the defendant (*e*) appears in time, and does not answer in time, then on attachment for want of an answer, or upon the defendant's craving a *dedimus* to answer in the country, or a defendant getting time to answer, an injunction will be granted of course, which is generally until answer and other order.

But after appearance and answer in time, the court must be applied to for an injunction on the merits; in which case you must draw a brief of the pleadings for counsel, and give a notice of motion in writing for such injunction to the defendant's clerk in court.

An injunction upon an attachment, *dedimus*, or upon the defendant's praying time to answer, does not extend to stay proceedings in the spiritual court, without special order. *P. Will. Rep.* 301.

Injunctions are usually granted in the cases, and for the purposes following, *viz.*

1. *To stay proceedings at law.*
2. *Waste or damage to freehold, by felling timber, pulling down buildings, &c.*
3. *To yield up, quiet, or continue possession of lands, &c.*
4. *To quiet possession before hearing.*
5. *Against continuing nuisances.*
6. *To prevent multiplicity of suits.*
7. *In ejectment causes.*
8. *To stay building; and herein of stopping up ancient lights.*
9. *On patents, &c. (f)*

(*e*) After appearance no special injunction can be obtained without notice. *2 Vez. Rep.* 112.

(*f*) As to restrain from felling a place; to prevent using an old road; from copying, engraving, &c. and felling of prints. *Barnard. Chan. Rep.* 211. to injoin the printing or vending printed copies of books, see *2 Black. Com.* 407. *4 Vin. Abr.* 278. pl. 3. 279. *2 Atk. Rep.* 142, 143. 342. *Bur. Lit Prop.* 19. 27, 28. 31. 33, 34. 61, 96, 97. 121.

I. *To*

1. *To stay Proceedings at law.*

A bill for this injunction usually suggests (*a*) some rigorous proceedings (*b*) at law, begun or threatened by defendant; or that he ought to be discharged from suit in question, by reason that debt is stale, and defendant hath slept long; or that debtor and creditor have been both dead long before action brought. If, on service of this injunction, defendant hath not commenced his action, he cannot sue out process. If he hath, but not served same, or in case he hath, but hath not delivered (*c*) or filed any declaration, he cannot proceed. If there be a declaration, he may call for a plea, and for want thereof sign judgment. If cause be at issue, he may go to trial; if that hath been had, and verdict obtained, he may proceed to judgment, and (*d*) affirm, if error hath been brought; but if judgment hath been executed, and debt and costs levied thereon, sheriff cannot pay same to defendant, execution being (*e*) stayed till answer, and further order.

This injunction is granted of (*f*) course, and if defendant be guilty of a breach thereof, upon being served therewith, court will commit him for contempt, as if there had been no clause therein of liberty for calling for plea, &c.

(*a*) Where a bill suggests, that suit at law is against conscience, if defendant is in contempt, for not answering, or prays time; it is held by this court to be contrary to conscience, to proceed at law in the mean time, and therefore it enjoins.

(*b*) Stays them, after election to proceed in this court.

(*c*) 2 Kel. Rep. 17. pl. 15.

(*d*) On Motion. Chan. Ca. 448.

(*e*) And that only touching the matters in question between the parties. In Exchequer *all* proceedings are stayed, be the cause in what stage it may.

(*f*) Gilb. Chanc. 194.

This

This injunction is granted for bankrupt, on producing his certificate, for suing him after same allowed and confirmed, and so it will on prosecution for equivocal perjury till hearing.

A. (g) diverted a watercourse, which put *B.* to great expence in laying of sooths, &c. and diversion being nuisance to *B.* he brought an action, against which injunction was granted upon bill exhibited for that purpose; it being proved that *B.* did see the work when carrying on, and connived at it, without shewing the least disagreement, but rather approbation and consent.

If a person is sued at law, for irregularly serving process of this court, injunction will be granted on motion, and affidavit of fact, to stay proceedings; for the irregularity is only punishable in this (*b*) court.

If the bill is to stay suits at law, you may have *subpœna* before (*i*) bill filed, by stat. 4 & 5 Ann. c. 16. and after it is, and defendant hath appeared, you may, on filing affidavit of the proceedings at law, and notice of motion, apply for injunction on merits.

Unreasonable delay is good cause for dissolving this [*k*] injunction.

Where this injunction is granted until hearing, court may then either dissolve injunction, or, if they see cause, order same to be made perpetual.

Lord Chancellor (*l*) *Macclesfield* granted an injunction against a bond of resignation, on account of the ill usage

(*g*) 2 Eq. Caf. Abr. 522. pl. 3.

(*b*) Vern. 269.

(*i*) But bill ought to be filed before return of *subpœna*.

(*k*) Yet court will sometimes, upon motion, revive injunction, altho' the same be dissolved, especially where equity appears evidently for plaintiff, or his case is hard.

(*l*) Stra. Rep. 534.

that had been made of it; and not on account of any defect in the bond itself, which his Lordship was pleased to declare he held good.

After a verdict at law, money must be deposited, before injunction will (*m*) be granted.

Injunction granted by *King*, Chancellor, against suing the acceptor of a bill of exchange, his acceptance having been declared void by the law of a foreign country, the same vacated (*n*) there, and party absolutely discharged.

If plaintiff prays to stay proceedings at law upon bond, they shall not be stayed, unless he submits to be bound by order of court, not to bring any writ of (*o*) error.

For more on this subject see "*In what cases injunctions are denied.*"

2. *Injunctions to stay Waste.*

Court will grant injunction to stay waste, as soon as same is begun, or to prevent the same, if reasonable ground be shewn to apprehend the committing thereof, in (*p*) land, (*q*) woods, or houses; by felling (*r*) timber, or other trees, destroying (*s*) buildings; or for or against committing any other kind of waste whatsoever, and such injunc-

(*m*) Chanc. Caf. 447.

(*n*) Mos. Rep. 1.69. 12 Vin. Abr. 87. pl. 9. 2 Eq. Caf. Abr. 476. pl. 2. 524. pl. 7.

(*o*) Vern. 120.

(*p*) As by plowing ancient meadow or pasture, Chanc. Rep. 14. 106. 116. Toth. 143, 144.

(*q*) Toth. 83.

(*r*) Chan. Rep. 242.

(*s*) As a castle, or defacing a feat. Salk. 161. pl. 14. 2 Vern. 738. pl. 647. Chan. Prec. 454. Gilb. Eq. Rep. 127. See 22 Vin. Abr. 520. pl. 20.

tion

tion will be granted, on (t) motion, and certificate of bill filed, and affidavit (u) of facts, being produced : against (x) a jointress ; tenant by (y) the courtesy ; or any other particular tenant ; so by patron against parson, for committing waste on (z) glebe ; so on behalf of an infant *en ventre sa mere* * ; and likewise for reversioner or remainderman in fee, against tenant for (a) life in possession, though he be not punishable for (b) waste, at (c) common law ; this being a special mischief ; and besides, though such tenant for life is not punishable, during continuance of remainder, yet after determination of that estate, he is. So likewise, the court will grant this injunction against (d) a lessee, that is against those, who hold mediately, or immediately, under him, who pays the writ, and those only : and where party's right, who makes application, appears apparent on (e) record, court will grant same before answer filed.

(t) In long Vacation, [viz. *Trinity*,] when court does not sit, and consequently no motion can be made, Lord Chancellor, upon petition, certificate of bill filed, and affidavit of facts, will grant injunction to stay waste complained of.

(u) Which must satisfy court how party derives his title to estate in question, in the cause, and also that some waste or spoil is done or threatened.

(x) Toth. 144.

(y) Hard. 96.

(z) Barnard. Chan. Rep. 399.

* 2 Atk. 117. 2 Vern. 710.

(a) Salk. 161. pl. 14. 2 Vern. 738. pl. 647. Chan. Prec. 454. Gilb. Eq. Rep. 127. See 22 Vin. Abr. 520. pl. 20.

(b) Roll. Abr. 337. Mo. 554. Toth. 61. Cary's Rep. 26. 36. Vern. 23. Co. Lit. 54. 2 Inst. 301. 5 Rep. 76.

(c) Toth. 188.

(d) Chan. Caf. 450. but not easily against mortgagee. *Ibid.*

(e) Vez. Rep. 454, 476.

In order to reconcile a seeming contradiction in what hath been laid down above, respecting tenant for life, not being punishable for committing waste, viz. that *he is and is not punishable*; turns upon the difference, whether he be punishable of waste, only from the *nature* of his estate, or by an express grant thereof; for the first mentioned tenant for life is restrained from committing any kind of waste; whereas the latter may cut down (*f*) timber, plow (*g*), open new (*h*) mines; but he will be restrained from pulling down houses or defacing (*i*) seats; because this is an abuse of the power, derogatory to the grant, and contrary to the intent of the privilege of "*without impeachment of (k) waste.*"

If bill is to *stay (l) waste*, you may have *subpœna* before (*m*) same be filed; and after defendant hath appeared, affidavits of *waste* may be filed, and upon notice of motion, injunction will be granted, if there be merits.

3. To yield up, quiet, or continue Possession of Lands.

This sort of injunction is a judicial writ, and subsequent to decree, being in nature of writ of execution, or *Hab. Fac. Poss.*

(*f*) Chanc. Rep. 242:

(*g*) Vern. 23.

(*h*) Salk. 161. pl. 14.

(*i*) 2 Chan. Caf. 32. Salk. 161.

(*k*) Salk. 161. But if defendant shews that he has an estate,

"*without impeachment of waste,*" injunction is *ordinarily* denied or dissolved, in case same be applied for, or granted, for *staying waste only.*

(*l*) Stat. 4 & 5 Ann. c. 16.

(*m*) But bill ought to be filed by, or before the return of *subpœna.*

4. *To quiet Possession before hearing.*

The court of equity hath jurisdiction to quiet men in their possessions (*n*); and therefore sometimes, in ordinary cases, grant injunctions to quiet them, before (*o*) hearing, to the party possession thereof: as for instance, where a party hath been in possession three years, and another disturbs him in such possession, this (*p*) court will grant injunction to quiet him in it; on this ground the law patentees had an injunction to restrain defendants from proceeding in printing any law (*q*) books; and the company of Stationers to stay books in custom-house, and hinder sale of statute books, printed beyond sea: It will stay defendant from disturbing plaintiff in quiet possession of a pew.

Where defendant was in possession, at time of exhibiting bill, plaintiff afterwards entered; injunction was granted against him to avoid possession; and in another case, defendant prayed, he might have injunction, or that bill be dismissed; the court held the application reasonable, and that he was well intitled to one or the (*r*) other.

Sometimes, pending suit, court will order party possession by injunction, or that rents, not already paid, shall

(*n*) By Coke, Ch. J. 3 Bulstr. 34. Lit. Rep. 166. Roll. Rep. 190.

(*o*) Affidavit verifying allegations in bill, was admitted to be read on moving for such an injunction. Bunb. Rep. 35. pl. 64. But this sort of injunction, it is said, hinders not defendants at law, from making leases, taking distresses; and it may be dissolved on cause shewn, as other injunctions.

(*p*) Toth. Rep. 37. Cary's Rep. 66. Vern. 156.

(*q*) 2 Chanc. Case. 76.

(*r*) Cary's Rep. 51. 63. 140.

be stayed in tenant's hands till hearing, and sometimes will order both; at other times will order (f) a receiver, who, (upon giving good security) shall receive rents and profits, and pay them into court, or account for them, when court shall require him so to do.

5. *Against continuing a Nuisance.*

Court will grant injunction, before answer filed, for a plain apparent nuisance, on certificate, affidavit, and notice to the party, his clerk in court, or solicitor: but in case of a special nuisance, court expects party to shew his right, and how he is particularly aggrieved, before this injunction will be granted.

6. *To prevent Multiplicity of Suits.*

Injunction may be obtained, in order to prevent multiplicity of suits; in this case, court will direct a verdict at law to determine them (t) all.

7. *In Ejectment Cause.*

Court never denies injunction in ejectment cause, where plaintiff agrees to give judgment, with release of errors, and consents not to bring any writ of error thereon, and sometimes is added by the court, to deliver peaceable possession of premises in dispute, in case same should be decreed on hearing the cause; these terms are directed, in order to save the trouble, delay, and expence of a trial at law.

(f) Receiver to enter into such recognizance as court direct to secure his accounting for, and paying such rents into court.

(t) Gilb. Chanc. 195.

8. *Staying*

8. *Staying Building, and herein of stopping up ancient Lights.*

The court (u) will interpose instantly by injunction to stay building, which will stop up ancient lights, by prescription or agreement, but the allegation that the building will stop them up must be suggested by bill.

9. *On Patents.*

Court (x) granted an injunction, on patent for printing almanacks, to restrain printing same, but not till patent had been produced in open court, under the broad seal.

The other matters touching injunctions, seem reducible to the following particulars, viz.

1. *In what Cases Injunctions have been denied.*
2. *Service of them.*
3. *Continuing them.*
4. *Dissolving them.*
5. *Irregular Injunctions.*
6. *Perpetual ones.*

1. *In what Cases Injunctions have been denied.*

According to the usual course of practice in this court, no injunction can be revived on an (y) amended, supplemental, or original bill, between same parties, whereon the first bill to stay proceedings at law, it was dissolved (z) on the merits.

(u) 2 Vez. Rep. 452. 543. Gilb. Hist. Chanc. 193, 194.

(x) Gilb. Chanc. 194.

(y) After answer and demurrer, bill was amended, and then injunction granted. See Gilb. 183.

(z) 2 Vez. Rep. 20.

Injunction hath been refused, while (a) a plea or demurrer was depending; for until it be argued, it appears not whether the court hath cognizance of the cause.

Exceptions to answer without report of its insufficiency, not good cause for obtaining injunction; because often filed for delay; and court will not presume exceptions valid, till so ascertained by the Master's report.

According to the course and practice of this court, injunctions are never to be granted (b) *before bill filed*, unless in particular cases, where there would be a manifest failure of justice, deprivation of right, by the act of God, or of the party himself, and in the cases of committing waste, or restraining suits at law, and such special instances which are always exceptions to all general rules. But that they are such, must be shewn to the court, in order to induce them to dispense with their ordinary proceedings. As in cases where, pending a suit brought by a mortgagee to foreclose, an advowson appendant to mortgaged manor became void, and though he had no (c) right to present, brought his *quare impedit*, the court granted injunction on defendant's application, though he had no bill (d) filed. Again,

Where a cause abated by death of defendant's testator, who being served with letter missive and copy of bill of revivor, would not appear, *being in (e) privilege*, upon motion, injunction was granted, though the cause not (f) revived.

(a) 3 P. Wil. Rep. 396. by Lord Chanc. Talbot.

(b) 4 Inst. 92. Vern. Rep. 156. Eq. Caf. Abr. 285. pl. 6.

(c) 4 Vin. Abr. 550. pl. 10.

(d) 2 Vern. 401.

(e) All privilege from suits is taken away by Stat. 10 Geo. 3. c. 50.

(f) Eq. Caf. Abr. 285. pl. 5. another to restrain working of mines. Eq. Caf. Abr. 285. pl. 6.

For more of this subject, "see injunctions to stay waste," and "proceedings at law."

Court will not grant an injunction unless a (g) right right appears. As upon a motion for an injunction to stop the sale of *English* bibles printed beyond sea, the Lord Keeper declared, he could not grant an injunction, but where a man has a plain right to be quieted in it; and directed a trial, wherein the patentees were to be plaintiffs, and the defendants to admit they had sold twelve bibles; and when the trial was over to come back (h) again. So where the University of *Oxford* had a patent for printing of bibles, the king's printers, being intitled under a patent, brought a bill to restrain them; though the court was of opinion, that the University could not print more than for their own use; yet it being a right determinable at law, would not grant an injunction, but directed (i) a trial. And where the *East-India* Company prayed an injunction to restrain the defendant from trading to the *East-Indies*, though the court was far from thinking the Company's patent void, which had been confirmed by so many kings; yet the validity of the patent being triable at law, an injunction could not be granted, till it was determined there; and a trial was (k) directed.

The court will refuse to grant injunction against a will bequeathing personal estate, under pretence of fraud (l) therein.

(g) Vern. 276.

(h) Vern. 120.

(i) Vern. 275.

(k) Vern. 127. 2 Chanc. Cas. 165.

(l) 2 P. Wil. Rep. 287.

2. *Serving Infundation.*

Infundation is served by shewing (*m*) original under seal, and (*n*) delivering a true copy thereof to party (*o*) personally.

If the party or his attorney proceed at law, after service of an infundation to stay proceedings, on affidavit sworn and filed of the service thereof, and of the breach of the infundation the party will be committed for breach of the infundation upon motion: or if he be arrested on an attachment, and enters his appearance with the register on the attachment, interrogatories are to be filed and exhibited against him, to which he must answer upon oath; and if he denies the service, the other party may examine one or more witnesses to prove the service; which if it be proved upon him, the court will commit him to the *Fleet* prison; and make him pay all costs and charges before he be discharged.

But the modern and usual way, where an infundation is served, and the party is in contempt (*p*) for breach thereof, is to give notice of motion to the adverse clerk in court, that the party may be committed to the *Fleet* prison for

(*m*) If original infundation be shewn at time of service, it need not be delivered in order to compare same. 2 Chanc. Caf. 203.

(*n*) It hath been held that leaving it with party's attorney or solicitor's clerk or servant is good service.

(*o*) Service must be personal on party, unless the court upon particular circumstances, dispenses with personal service, as where the plaintiff at law cannot be found, or resides abroad, upon affidavit court will substitute a service upon his solicitor or attorney.

(*p*) Though infundation is *irregularly* obtained, party will be in contempt for disobedience thereof. See 2 Chanc. Caf. 203. his remedy for redress being to apply to court, to set same aside for irregularity.

breach of the injunction. And having made an affidavit of the service of the injunction counsel moves it; and if the other side are not prepared to defend the motion, the court usually gives them a day to shew cause against such motion; and then upon hearing the affidavits on both sides, the court decides whether the party is guilty of the breach of the injunction or not; and if he be, makes an order for his commitment to the *Fleet* prison, from whence he cannot be discharged until he has paid the adverse party his costs; and sometimes until he has made restitution to the injured party for the damages sustained for breach of the said injunction.

Bailiffs who served execution for breach of injunction, found money hid in the house, which they took away; ordered that plaintiff make good money to defendant, and satisfy all damage he would swear he had (*q*) sustained.

3. *Of continuing Injunctions.*

Injunction may be continued on exceptions to answer.

Plaintiffs alledging to court, on defendant's answer coming in, that same was insufficient, in order to prevent injunction being dissolved, is not sufficient ground to induce court to continue (*r*) injunction.

In some particular cases court will continue injunction after (*s*) defendant hath fully answered equity of bill.

Where (*t*) an injunction shall be continued till some of the defendants put in their answer, by reason that those defendants that live in *Ireland*, have been served with process, and have not put in their answer, and that bail is given in the action.

(*q*) Vern. 207.

(*r*) 2 Vez. Rep. 453.

(*s*) 2 Vez. Rep. 19.

(*t*) Barnard. Chan. 354.

Where (u) an injunction shall not be continued till the hearing, but only till the answers of some of the defendants come in, when they live in *Ireland*.

Court (x) will not continue injunction against penalty of bond, unless money be brought into court, or judgment confessed at law with release of errors, and if plaintiff be insolvent, court will suffer defendant to proceed at law, to second *sci. fac.* in order to make the bail liable.

Injunction granted on merits, or on special cause of equity, commonly continues till hearing, unless plaintiff delays his suit.

Injunction may be extended to stay trial, if plaintiff makes affidavit that he believes a discovery will arise out of defendant's answer, so as to enable him to make a good defence at law; this is a special motion, and due notice must be given of it in the usual manner

4. *Dissolving Injunctions.*

All injunctions are dissolved upon motion in open court; and if the same be obtained on attachment for want of appearance or answer; so soon as contempt is (y) cleared, and answer (z) filed, instructions must be given to counsel to move to dissolve the injunction *nisi* (a) for the purpose of giving adverse party opportunity to shew cause why it should

(u) *Id.*

(x) *Chanc. Caf. 444.*

(y) That is the costs paid, (which are eleven shillings,) or tendered to plaintiff's clerk in court.

(z) To dissolve injunction, upon coming in of answer, unless cause, is a motion of course.

(a) If plea is ordered to stand for answer, motion must be to dissolve injunction *nisi*, not absolutely. *Mos. Rep. 198, pl. 111.*

not; this order being obtained, same must be drawn up, entered, and served on plaintiff's clerk in court.

If, on day to shew cause, same be shewn on merits, injunction is sometimes continued to hearing; and if exceptions are filed to answer, and shewn for cause; then plaintiff is always ordered to procure Master's (*b*) report in four days; or in default thereof, injunction to stand dissolved, without further motion.

If report be not procured in reasonable time, or if answer be reported sufficient; upon motion, injunction will be dissolved absolutely.

In the usual course of practice, after answer comes in defendant moves to dissolve injunction *nisi*, which is generally granted, if defendant hath fully answered equity of plaintiff's bill, otherwise (*c*) not.

When a plea or demurrer and answer is argued by counsel, and allowed, there is generally, though not always, an end of the injunction; for some equity may be shewn for continuing it, arising out of the defendant's answer, put in with such plea or demurrer: and upon a plea or demurrer being allowed, or on coming in of the answer, the court will not absolutely dissolve the injunction on the first motion, though upon affidavit of notice, but only *nisi*.

Injunction in cause abated by death of either party, unless motion to revive same within stated time, will be dissolved.

Injunction for want of answer dissolved, because not served till several months after (*d*) answer come in.

On cross bills, if, when first is answered, second is not answered in eight days, injunction will be dissolved on motion.

(*b*) If Master reports answer insufficient, injunction will be continued, till defendant answers exceptions.

(*c*) 2 Vez. Rep. 19.

(*d*) 2 Kel. Rep. 43. pl. 29.

Court will not dissolve injunction continued on exceptions, if they have not been filed a reasonable time before motion made.

If Master's report is not procured in four days, after exceptions filed, or if answer is reported sufficient, injunction will be dissolved absolutely (e).

Causes for not dissolving injunction.

1. *Want of Appearance or Answer.*
2. *Not having cleared Contempts.*
3. *Not having denied all Equity.*
4. *Answer being reported insufficient.*
5. *All Defendants not having answered.*
6. *Plaintiff having (f) Equity, or his Case being hard.*
7. *Because Exceptions to answer came in only Night or Morning before Motion to dissolve.*

Injunctions not usually dissolved at last seal after term; nor ever but upon motion of adverse party.

For more on this subject, see, "*Injunctions to quiet possession before hearing:*" "*Irregular Injunctions:*" "*Continuing Injunctions.*"

5. *Irregular Injunctions.*

If injunction be irregularly obtained, it is a motion of course to refer same to Master; and if he reports injunc-

(e) Sometimes *absolutely* on first motion.

(f) Injunction granted on special cause of equity, commonly stands till hearing, unless plaintiff delays suit.

tion irregularly issued, such report may be excepted to, the exceptions must be filed, and five pounds deposited with register, whereupon they are argued in court.

If no exceptions are filed, court, upon Master's report, will dissolve injunction, and some times, commit clerk in court to *Fleet*, for making out such injunction, and make him pay all costs, and sometimes the damages injured party hath sustained, by reason of such irregular injunction.

If (g) injunction is irregular, defendant does not, by applying for time to answer, waive the redress he is intitled to, by means of such irregularity.

6. Perpetual Injunctions.

Where the case requires it, court will grant perpetual injunctions; as in the following instances, viz.

1. Against proving will in spiritual court, same being found, on trial at law, to be no (b) will.

2. To stay action at law of several persons, where right had been tried and determined by one (i) trial.

3. On bill taken *pro confesso*, by reason of defendant's contempt, in standing out all process; if same prays injunction to quiet possession, or to stay proceedings at law, court will decree perpetual one.

4. After two (k) verdicts on trials at (l) bar, in favour of plaintiff's title, perpetual (m) injunction was decreed,

(g) 2 Vez. Rep. 20.

(b) Chanc. Cas. 80.

(i) See Vern. Rep. 266.

(k) 2 Vern. 410.

(l) There had been several county verdicts to the contrary, but the trials at bar were lost.

(m) This injunction operates to quiet possession of plaintiff and his heirs for ever, and all person or persons claiming by, from, or under him; and it is granted upon a plain equitable title, Gilb. Chanc. 195.

that right may be quieted in (n) ejectments, as it was in real actions, where verdict was final; and this was affirmed in the House of (o) Lords, the bill (p) for this purpose is a bill of peace.

5. Granted (q) against a bond of fifty years standing.

6. May (r) be obtained on decree for performance of trusts.

Perpetual injunction will the rather be granted, when court directs trial, or where cause against which verdicts are found, is odious in (s) its nature.

Acceptance of bill of exchange becoming void by the law of a foreign country; and the same having been vacated by the sentence of a competent court there; and party discharged therefrom in consequence thereof; King, (t) Chancellor, granted a perpetual injunction against all proceedings here.

For more of injunction, see 2 *Eq. Cas. Abr.* 522 to 529.

(n) Party is always at liberty to bring new ejectment at law.

(o) In the case of Lord *Bath* and *Sherwin*; and of *Leighton*, and *Leighton*. *Stra. Rep.* 404. *Peer Wil. Rep.* 671.

(p) *P. W. Rep.* 672.

(q) *Cas. in Chanc. Temp. Finch.* [Earl *Nottingham*] Fol. 77

(r) 2 *Vez. Rep.* 90.

(s) *P. W. Rep.* 673.

(t) *Mof. Rep.* 1. 69. 12 *Vin. Abr.* 87. pl. 9. 2. *Eq. Cas. Abr.* 476. pl. 2. 524. pl. 7.

An Order for an Injunction on a Dedimus.

Master of } *Thursday* the day of in the
the Rolls. } year of the reign of his Majesty King *George*
the Second, and in the year of our Lord
between *A. B.* and *C. D.* complainants, and
E. F. defendant.

Forasmuch as this court was this present day informed by Mr. being of the plaintiff's counsel, that the defendant being served with process to appear to and answer the plaintiff's bill, hath appeared accordingly, but for delay hath craved a commission to answer in the country; and yet in the mean time the said defendant prosecutes the plaintiffs at law for the matters in the bill complained of: It is thereupon ordered that an injunction be awarded against the defendant for stay of his proceedings at law against the said plaintiffs, until the said defendant shall fully answer the plaintiff's bill, and this court make other order to the contrary; but the said defendant is in the mean time at liberty to call for a plea, and to proceed to trial thereon, and for want of a plea to enter up judgment; but execution is hereby stayed.

Docquet upon an Injunction on a Dedimus.

The King, and so forth; To his counsellors, attornies, solicitors, and agents, and every of them, greeting. Whereas it hath been represented to us in our court of Chancery, on the part of *A. B.* and *C. D.* complainants, that they have lately exhibited their bill of complaint in our said court of Chancery, against you the said *E. F.* defendant, to be relieved touching the matters therein contained; and that you the said defendant *E. F.* being served with a writ, issuing out of the said court, commanding you to appear to and answer the said bill; have appeared, but for delay have craved a commission to answer in the country; and yet in the mean time, you unjustly (as is alledged) prosecute

prosecute the said complainants at law, for and touching the matters in the said bill complained of: We therefore, in consideration of the premisses, do hereby strictly command and injoin you the said *E. F.* defendant, and all and every the persons before mentioned, under the penalty of two hundred pounds, to be levied on your and each of your lands and tenements, good sand chattels, to our use, that you and each of you do henceforth absolutely desist from all further proceedings at law against the said complainants, or either of them, touching any of the matters in the said bill complained of, until you the said defendant *E. F.* shall fully answer the said complainant's bill, and this court make other order to the contrary: But nevertheless the said defendant *E. F.* in the mean time is at liberty to call for a plea, and proceed to trial thereon, and for want of a plea to enter up judgment; but execution is hereby stayed. Witness the King at *Westminster* the day of in the year of his reign.

Order for an Injunction on an Attachment.

At the Rolls. } *Thursday* the day of in the
Master of the } year of the reign of our Sove-
Rolls. reign Lord, King *George* the Third.
Between *A. B.* plaintiff, and *C. D.*
and *E. F.* defendants.

Forasmuch as this court was this present day informed by Mr. being of the plaintiff's counsel, that the defendants being served with process to appear to and answer to the plaintiff's bill, refuse so to do, are in contempt to an attachment for want thereof, and yet in the mean time prosecute the plaintiff at law for the matters in the bill complained of: It is thereupon ordered that an injunction be awarded against the said defendants, for stay of their proceedings at law, for and touching any matters here in question, until the said defendants shall appear to
and

and fully answer the plaintiff's bill, clear their contempt, and this court make other order to the contrary: But the said defendants are in the mean time at liberty to call for a plea, and proceed to trial thereon, and for want of a plea to enter up judgment; but execution is hereby stayed.

Docquet for an Injunction on an Attachment.

The King, and so forth; To their counsellors, attornies, solicitors, and agents, greeting. Whereas it is represented to us in our court of Chancery on the part of *A. B.* complainant, that he hath lately exhibited his bill of complaint in our said court of Chancery against you the said *C. D.* and *E. F.* defendants, touching the matters therein contained; and that you the said defendants being served with a writ, issuing out of our said court, commanding you to appear to and answer the said bill, have not obeyed the same, but are in contempt to an attachment, for not appearing to and answering the said bill; and yet in the mean time you unjustly, as is alledged, prosecute the said complainant at law, touching the matters in the said bill complained of: We therefore, in consideration of the premises, do strictly injoin and command you the said *C. D.* and *E. F.* and all and every the persons before mentioned, under the penalty of two hundred pounds, to be levied on your and each of your lands, goods and chattels, to our use, that you and each of you do absolutely desist from all farther proceedings at law against the said complainant, touching any of the matters in the said bill complained of, until you and each of you shall appear to and fully answer the complainant's said bill, clear your contempts, and this court make other order to the contrary; but nevertheless the said defendants are at liberty to call for a plea, and proceed to a trial thereon, and for want of a plea to enter up judgment; but execution is hereby stayed. Witness the

the King at *Westminster* the day of in the
year of his reign.

The Form of a Writ of Injunction.

George the Second, by the grace of God, of *Great Britain, France and Ireland*, king, defender of the faith, and so forth; To his counsellors, attornies, solicitors and agents, and every of them, greeting. Whereas it hath been represented unto us, in our court of Chancery, on the part of complainant, that he hath lately exhibited his bill of complaint into our said court of Chancery against you the said , defendant, to be relieved touching the matters therein contained; and that you the said defendant being served with a writ, issuing out of our said court, commanding you to appear to and answer the said bill, *have not obeyed the same, but are in contempt to an attachment for not appearing to and answering the said bill*; and yet in the mean time you unjustly, as is alledged, prosecute the said complainant at law, touching the matters in the said bill complained of: We therefore, in consideration of the premisses, do strictly injoin and command you the said and all and every the persons before mentioned, under the penalty of two hundred pounds, to be levied on your and every of your lands, goods and chattels, to our use, that you and every of you do absolutely desist from all farther proceedings at law against the said complainant, touching any of the matters in the said bill complained of, until you the said defendant shall have fully answered the said bill, cleared your contempt, and our said court shall make other order to the contrary: But nevertheless, the said defendant is at liberty to call for a plea, and to proceed to trial thereon; and, for want of a plea, to enter up judgment; but execution is hereby stayed. Witness ourself at *Westminster* this day of in the
year of our reign.

On

On a Dedimus.

a

To which bill you the said defendant have appeared, but for delay have craved a commission to take your answer in the country.

On an Order for Time.

b

To which bill you the said defendant have appeared, but for delay have obtained an order of our said court for time to answer the same; and yet in the mean time prosecute, &c.

On an insufficient Answer.

c

To which bill you the said defendant have appeared, but for delay have put in an insufficient answer; and yet in the mean time prosecute, &c.

On an Attachment for want of an Answer.

To which bill you the said defendant have appeared, but have not answered the same, and are in contempt to an attachment for want thereof; and yet in the mean time prosecute, &c.

An Injunction to stay committing waste.

George the Second, &c. To *A. B.* and his workmen, labourers, servants and agents, and each and every of them, greeting. Whereas it hath been represented unto us in our court of Chancery, in a certain cause there depending, wherein *C. D.* is complainant, and you the said *A. B.* are defendant, on the part of the said complainant, that, &c. [*as in the order*]. We therefore, in considera-

Note; In the injunctions marked *a*, *b*, *c*, these words are to be left out (viz.) *have cleared your contempt.*

tion of the premisses aforesaid, do strictly injoin and command you the said *A. B.* and your workmen, labourers, servants and agents, and all and every one of you, under the penalty of one thousand pounds, to be levied upon your and each and every of your lands, goods and chattels, to our use, that you and every one of you do from henceforth altogether absolutely desist from felling or cutting down any timber or other trees, standing, growing or being in or upon the premisses in question, or from committing or doing any other or further waste or spoil in or upon the said premisses, or any part thereof, until our said court shall make other order to the contrary. Witness, &c.

A special Injunction to stay Execution till the Hearing.

George, &c. To *C. D.* his counsellors, attornies, solicitors and agents, and every of them, greeting. Whereas it hath been represented unto us in our court of Chancery on the part of *A. B.* complainant, against you the said *C. D.* defendant, that the complainant being, &c. [*set forth the allegation as in the order*] therefore it was prayed that the complainant might have an injunction for stay of your the said defendant's proceedings at law until the hearing of the cause: We therefore in consideration of the premisses aforesaid, do strictly injoin and command you the said *C. D.* and all and every the persons before metioned, under the penalty of one thousand pounds, to be levied upon your and every of your lands, goods and chattels, to our use, that upon the said complainant's giving unto you the said defendant *C. D.* judgment on the said bond, with a release of errors (and consenting not to bring any writ of error) subject to the order of our said court, that you and every of you do absolutely desist from taking out execution against the said complainant until the hearing of this cause by our said court of Chancery. Witness, &c.

A special Injunction to stay the Defendants from copying, engraving, &c. and selling of Prints, pursuant to an Act of Parliament.

George, &c. To , and also to their
and every of their servants, workmen and agents, and to
all and every of them, greeting. Whereas on the
day of , and on the day of last, it
was alledged to us in our court of Chancery, by counsel on
behalf of and his wife, plaintiffs, against
you the said , defendants, that by an act of parliament
made in the eighth year of the reign of it is (amongst
other things) enacted, That from and after the twenty-
fourth day of June, one thousand seven hundred and thirty-
five, every person who should invent and design, engrave,
etch or work in *metzotinto* or *chiaro obscuro*, or from his own
works and inventions should cause the same so to be done,
should have the sole right and liberty of printing and re-
printing the same for the term of fourteen years, to com-
mence from the day of the first publishing thereof, unless
by the consent of the proprietor first had in writing, and
signed in the presence of two or more credible witnesses,
under the penalties in the said act particularly mentioned :
That the said plaintiff , since the said twenty-
fourth day of June, one thousand seven hundred and thirty-
five, hath with great labour and expence invented, design-
ed, etched and engraved about prints, being the
representations of, &c. And on the day of
1783, published four of the said prints, representing
and ; and that notwithstanding
the said act of parliament, you the said defendants have
copied, published and sold the said four last mentioned
prints, as by the affidavit of the plaintiff read,
appeared; to be relieved wherein, the said plaintiffs have
exhibited their bill in our said court of Chancery against
you the said defendants, as by the Six Clerks certificate
appeared,

appeared, and you the said defendant having put in your answer thereto, thereby admit to have sold and published the said prints, but say they were sent to you by the said defendant, and that as soon as you was informed of the said plaintiff's right, you sent them back again: We having regard to the matters aforesaid, and on reading affidavits of notice of the said motions, do therefore strictly command and injoin you the aforesaid defendants and your servants, working-men and agents, and all and every of you, under the penalty of one thousand pounds, to be levied upon your and each of your lands, goods and chattels, to our use, that you, and each, and every one of you, do from henceforth altogether desist from copying, engraving, etching, working, publishing and selling all or any of the aforesaid prints, until the further order of our said court of Chancery. Witness, &c.

A Writ of Injunction for the Defendant to deliver possession of Lands to the Plaintiff, pursuant to a Decree.

George the Third, &c. To C. D. and all other person and persons whatsoever, who are in possession of, or have or claim any right, title or interest whatsoever of, in or to all or any part of the messuage, lands, tenements or premises in question, greeting. Whereas it hath been represented to us in our court of Chancery, in a cause wherein A. B. and E. his wife are complainants, and you the said C. D. are defendant, that by the decree made in this cause it was ordered, that you the defendant C. D. should deliver possession of the premises in question, and all deeds and writings in your custody or power relating thereto, to the said complainants; that you the defendant, who are in possession of the messuage or lands in question, was served with a writ of execution of the said decree, and have been required to deliver possession of the messuage and lands, which you refuse to do; and a commission of rebellion having been made out against

R r

you

you the defendant, and returned, that you the defendant are not to be found, it was ordered, that an injunction be awarded against you the said defendant, to injoin you to deliver possession of the said messuage and lands to the said complainants, pursuant to the said decree: We therefore, in consideration of the premises, do strictly injoin and command you the said defendant *C. D.* and all and every other persons before named, under the penalty of one thousand pounds, to be levied upon your, each and every of your lands, goods and chattels, to our use, that you, each and every of you, do deliver the possession of the said messuage, lands and premises, and of every part and parcel thereof, to the said complainants *A. B.* and *E.* his wife, pursuant to the said decree: And hereof fail not at your peril. Witness, &c.

The great regno

I S a writ to restrain a person from going out of the kingdom without the king's licence, or leave of this court.

This writ was formerly called a statute writ, and then sparingly made use of; but it is now considered a remedial writ, and, as such, become a common process of the court; it issues at the commencement of a suit, when the plaintiff apprehends defendant will fly to foreign parts, and thereby endeavour to avoid the justice of the (u) nation; it is granted at the instance of the plaintiff, by his application to court, on motion or petition, and affidavit that defendant is going beyond sea, and of (x) money due to plaintiff, and which, if defendant should have an opportunity of leaving the kingdom, plaintiff would be in danger of losing; this writ is always marked on the back thereof, with the sum sworn to, as a guide to the sheriff, (to whom only it is generally directed) to take sufficient surety by bail bond, for yielding obedience thereto, in , that defendant will not depart the realm, without permission of the court first obtained; and on defendant's refusal to enter into such bond, sheriff may carry him to prison.

When a party is (y) taken, he must give a bond to Master of the Rolls, in such penalty as the writ requires for yielding obedience thereto, or satisfy the court by answer, affidavit, or otherwise, that he hath no design of leaving the kingdom, or

(u) 2 Chanc. Caf. 245.

(x) By standing order in Lord Chanc. *Cowper's* time, oath is to be made of the debt.

(y) It hath been held an abuse of this process, to break open doors, and take party in bed; yet court, for this cause, would not order him to be set at liberty.

that he is not indebted to plaintiff in any sum of money whatever; then he may give notice, and move the court, that the writ may be discharged, and upon hearing counsel on both sides, court will either discharge (z) or continue same.

This writ hath been granted to stay defendant from going to (a) *Scotland*; for though it be not out of the kingdom, yet being out of the reach of the process of the court, it is within same (b) mischief.

A writ of *ne exeat regno* ought not to be granted without (c) a bill first filed whereon to ground same, nor where the demand is entirely at law; for there the plaintiff has bail, which he ought not to have both at law and in equity. 3 *P. Wil. Rep.* 312. *Ex parte Brunker. Vide Prec. Chan.* 171.

This writ hath been granted in Chancery to stop one from going beyond sea to avoid a sentence in the ecclesiastical court. *Sir Jerome Smithson's case.* 2 *Vent.* 345.

A person having my money, and being about to go out of the kingdom, I may, by suit, stay him here till he hath

(z) The modern practice is for the defendant to give security to abide the decree pronounced on hearing, before court will discharge the writ, which security is taken by recognizance before the Master, as all other securities are. So that defendant taken by Sheriff on a writ *ne exeat Regno*, seems obliged to enter into no less than three different bail-bonds, before he can be discharged or set at liberty, viz. in one to the Sheriff, in another to his Honour of the Rolls, and in a third to a Master in Chancery.

(a) Note. In this case, condition of recognizance must be, not to go out of the realm, or to *Scotland*.

(b) 2 *Salk.* 702. 3 *Mod.* 127, 169. 4 *Mod.* 179. *P. Wil. Rep.* 263. See *Caf. Temp. Talbot*; *Chanc.* 198.

c That this writ lies for a private matter, without bill filed. See *Chan. Caf.* 116. 2 *Chan. Rep.* 19. *F. N. B.* 85. As for Client, on his solicitor's bill, on taxation being reported over paid 60*l.* solicitor being about to go beyond sea. *Pre.* in *Chanc.* 171.

given security to pay me. *Vide Stat. 5 Rich. 2. c. 2. Crompt. Jur. 64. Toth. 136.*

If the person, against whom the writ issues, answers, and denies the equity of the bill, and if the court upon hearing counsel on both sides, see no cause to the contrary, the writ will be discharged.

A surety in a *ne exeat regno* is not to be discharged upon the defendant's putting in his answer, not even after a decree against the defendant, and commitment for 19,000*l.* decreed against him; for if there is no danger of the defendant's going beyond sea, being in prison, then the surety is in no danger. *Preced. Chanc. 230. 1 Wms. 263.*

The form of the Writ ne exeat regno.

George the Third, by the grace of God, of *Great Britain, France and Ireland*, king, defender of the faith, and so forth. To our sheriff of *Middlesex*, greeting. Whereas it is represented to us in our court of Chancery, on the part of *A.B.* complainant, against *C.D.* defendant (amongst other things,) that he the said defendant is greatly indebted to the said complainant, and designs quickly to go into parts beyond the seas (as by oath made on that behalf appears,) which tends to the great prejudice and damage of the said complainant. Therefore, in order to prevent this injustice, we do hereby command you, that you do without delay cause the said *C. D.* personally to come before you and give sufficient bail or security in the sum of

that he, the said *C. D.* will not go or attempt to go into parts beyond the seas, without leave of our said court; and in case the said *C. D.* shall refuse to give such bail or security, then you are to commit him the said *C. D.* to our next prison, there to be kept in safe custody, until he shall do it of his own accord; and when you shall have taken such security, you are forthwith to make and return a certificate thereof to us in our said

court of Chancery, distinctly and plainly under your seal,
together with this writ. Witness ourself at *Westminster*
the day of in the year of our
reign.

Indorsed By the Lord High Chancellor of *Great Britain*,
at the instance of *A. B.*

The Returns of the Terms.

Hilary Term.

This Term begins the 23d of January, and ends the 12th of February following; and hath four Returns.

R r 4

For the writ.

- 1. { In eight days after St. Hilary next ensuing.
- 2. { In eight days next ensuing after St. Hilary.
- 3. { In fifteen days after St. Hilary next ensuing.
- 4. { In fifteen days next ensuing after St. Hilary.

{ On the morrow of the Purification of the Blessed Virgin Mary next ensuing.

{ In eight days after the Purification of the Blessed Virgin Mary next ensuing.

{ In eight days next ensuing after the Purification of the Blessed Virgin Mary.

Easter

The Returns.

615

For the label.

{ In eight days after St. Hilary.

{ In fifteen days after St. Hilary.

{ On the morrow of the Purification.

{ In eight days after the Purification.

Easter Term.

This Term begins the Wednesday fortnight, or seventeen days after Easter-day, and ends the Monday next after Ascension-day, and hath five Returns,

- | | | | |
|------|--|---|---|
| 1. { | In fifteen days after <i>Easter</i> next ensuing. | { | In fifteen days after <i>Easter</i> . |
| 2. { | From the day of <i>Easter</i> next ensuing in three weeks. | { | In three weeks after <i>Easter</i> . |
| 3. { | From the day of <i>Easter</i> in three weeks next ensuing. | { | In one month after <i>Easter</i> . |
| 4. { | From the day of <i>Easter</i> next ensuing in one month. | { | In five weeks after <i>Easter</i> . |
| 5. { | From the day of <i>Easter</i> in one month next ensuing. | { | On the morrow of the <i>Ascension</i> . |
| | From the day of <i>Easter</i> next ensuing in five weeks. | | |
| | From the day of <i>Easter</i> in five weeks next ensuing. | | |
| | On the morrow of the <i>Ascension</i> of our Lord next ensuing | | |

Trinity

Trinity Term.

This Term begins the Friday next after Trinity Sunday, and ends the Wednesday fortnight after; and hath four Returns. [See 32 H. 8. c. 21.]

- | | |
|--|---|
| <p>1. On the morrow of the Holy Trinity next ensuing.</p> <p>2. { In eight days after the Holy Trinity next ensuing.
In eight days next ensuing after the Holy Trinity.
In fifteen days after the Holy Trinity next ensuing.
In fifteen days next ensuing after the Holy Trinity.</p> <p>3. { From the day of the Holy Trinity next ensuing in three weeks.
From the day of the Holy Trinity in three weeks next ensuing</p> <p>4. {</p> | <p>} On the morrow of the Trinity.</p> <p>} In eight days after Trinity.</p> <p>} In fifteen days after Trinity.</p> <p>} In three weeks after Trinity.</p> |
|--|---|

Michael-

Michaelmas.

This Term by the Statute 16 Car. I. c. 6. begun the 23^d of October, and ended the 28th of November; and had six Returns; But by Statute 24 Geo. II. c. 43. it begins 6 November, and endeth 28th, and is abridged to four Returns only.

- | | | |
|----|--|---|
| 1. | { From the day of St. Michael next ensuing in three weeks.
From the day of St. Michael in three weeks next ensuing.
From the day of St. Michael next ensuing in one month.
From the day of St. Michael in one month next ensuing. | { In three weeks after St. Michael.
In one month after St. Michael.
On the morrow of All-Souls.
On the morrow of St. Martin. |
| 3. | On the morrow of All-Souls next ensuing. | |
| 4. | On the morrow of St. Martin next ensuing. | |

A TABLE

A T A B L E of the Days of hearing Causes, Motions, &c. before the Lord Chancellor and the Master of the Rolls.

By the Lord Chancellor. TERM-TIME.

- Causes. { IN Term-time, every *Monday Tuesday, Wednesday, and Friday*, are days for hearing Causes at *Westminster* by the Lord Chancellor.
- Seal-days. { Every *Tuesday, Thursday and Saturday* in Term-time, are Seal days.
The first and last days of the Term, are days for sealing Writs and Motions only.
- Motions. { Every *Thursday* in Term is a day for Motions, except in the *first or last* week of the Term, and then it is a day for Causes.
All the days in Term, when the court sits, are days for common Motions, which are moved after the Causes are heard, just before the rising of the court.

VACATION.

- Motions in the Vacation. { In the Vacation, the general Seal-days only, as appointed by the Lord Chancellor, are days for Motions.

No Motions are heard *after* the last *general* Seal.

- Rehearing. { Every *Saturday* in Term is a day for Rehearings.

- Exceptions, Pleas, and Demurrers. { *Wednesdays and Fridays* in the afternoon, Lord Chancellor sits in *Lincoln's Hall* on Exceptions, Pleas, and Demurrers.

- Petitions. { The next day after the *last* Seal-day, *before and after* the Term, is usually a day for Petitions. — There are also days of Petitions usually appointed by the Lord Chancellor.

At the R O L L S.

T E R M - T I M E.

Causes.

{ In Term-time, every *Monday, Tuesday, Thursday, and Saturday*, are days for hearing Causes at the Rolls by the Master of the Rolls in the afternoons.

Pauper-
Causes.

{ The second *Saturday* in Term is always a day for hearing Pauper-causes at the Rolls.

A F T E R T E R M.

Causes in
Vacations.

{ The first week *after* the Term, the Master of the Rolls sits all the Mornings on Causes, and towards the third Seal, in the afternoons.

Petitions.

{ There is also a Day of Petitions at the Rolls after the Term, which his Honour appoints.

Motions.

{ The next morning after the Term, Motions are allowed to be made at the Rolls, by the Lord Chancellor.

A
L I S T
O F

HOLYDAYS kept at the CHANCERY OFFICE.

HILARY TERM.

- January 30.* King *Charles's* Martyrdom.
February 2 Purification of the Blessed Virgin *Mary*.
March 25. Lady-Day (unless the court sits)
 Good Friday.
 Easter Monday.

—— Tuesday.

—— Wednesday.

No candles to be lighted after the second seal
 after this term, till the first day of Michaelmas term.

EASTER TERM.

- May 29.* Ascension Day.
 King *Charles* the Second's Restoration.
 Whitfun Monday.
 —— Tuesday.
 —— Wednesday.

TRINITY

TRINITY TERM.

- June* 4. King's birth day.
 24. St. *John* the Baptist (unless the court sits, or notice night.)
August 24. St. *Bartholomew*.
September 2. London burnt.
 22. Coronation day.
 29. St. *Michael*.
November 5. Gunpowder plot.

MICHAELMAS TERM.

- November* 9. Lord Mayor's day (if not notice night.) Office shut that afternoon.
December 25. Christmas day.
 26. St. *Stephen*'s day.
 27. St. *John*.
 28. Holy Innocence.
January 1. Circumcision.
 6. Epiphany.
 No candles to be lighted after the last seal after this term, till the first day of Hilary term.
-

T A B L E

O F

PRINCIPAL MATTERS.

Abatement.

Assiduit.

<i>Vide</i> bill of revivor	Page 451
To annex a bill of discovery	454
To a bill of interpleader	ibid.
That plaintiff had deeds, but has lost them to annex to a bill	ibid.
To obtain a writ ne exeat regno	455, 456
Of waste being committed	ibid.
Of poverty	457
Of a person's age	ibid.
Of service of subpœna to obtain an injunction	458
Of service of an order nisi to make same absolute	459
Of residence of defendant to obtain subpœna returnable immediately	460
Of service of subpœna from	

defendant's confession of service	461
Of service of subpœna to appear and answer or hear judgment	Page 461
To obtain an order, that service of subpœna to hear judgment may be good service on defendant's solicitor	463
Of seeing another person serve a subpœna	464
That defendant absconds	465
Of serving a subpœna for a better answer	ibid.
Of service of subpœna for costs &c.	466
Of service of subpœna to name an attorney	ibid.
That defendant cannot be found	467
That defendant cannot answer without sight of deeds in the country	468
That defendant is sick, and unable to answer	ibid.
That	That

TABLE OF PRINCIPAL MATTERS.

That defendant is unable to attend to put in his answer	Page 469	Of having discovered new matter for a bill of review	Page 479
Of a witness being old and infirm to examine de bene esse	ibid.	Of waiting at the Rolls to receive money reported due	480
Of service of subpoena to testify	470	Of facts for further adjourning cause	ibid.
Of defendant his clerk in court and solicitor to enlarge publication the commission being returned	ibid.	Of defendant being served with subpoena to hear judgment in order to dismiss the bill, if the plaintiff makes default at the hearing.	481
Of clerk in court to enlarge publication	471	To ground an application for a commission to examine witnesses abroad	ibid.
Of solicitor to enlarge publication	472	In support of a charge at the Master's office	482
Of service, of notice, of motion	473	The like	483
Of mortgagee attending to receive his money pursuant to the Master's report	473	Of the office-copy of a judgment roll, being a true copy examined and compared with the records in support of a charge	484
Of serving a petition	474	Amended Bill.	21
Of serving an order on a clerk in court	475	Amendments,	
Of serving an order to confirm a Master's report, unless cause	ibid.	How made	22, 23
Of serving an order on two clerks in court	476	Of answers	206
Of serving an injunction	ibid.	Amercement	
To obtain an order that service of an order nisi upon the clerks in court may be good service	477	Sheriff liable thereto for not returning process	101
Of producing all deeds, &c. before a Master	ibid.	Answer.	196
Of serving a writ of execution of decree upon a clerk in court	478	How drawn &c.	197
Of service of a writ of execution upon the parties	ibid.	Words of course preceeding and concluding	207
		Time	

TABLE OF PRINCIPAL MATTERS.

Time to answer in town and country, and how order for same obtained	Page 225, 226	Second or third insufficient	Page 267
Signing same by the defendant	199, 227	Appearance	93
Swearing and filing	227	With the register	143
Of a Quaker how taken	228	Gratis to rejoin	293
Of a Jew	ibid.	Attachment	
Of a Peer or Peerefs of the realm	ibid.	When it issues, and for what	100
Without oath	ibid.	Has two returns	ibid.
In a foreign language how translated	ibid.	Return of cepi corpus	101
Taken by dedimus	229, 231	Form thereof	102
Taken by dedimus ex parte	232	For costs	103
Answer of a Quaker by dedimus	233	For want of answer or appearance	
Taken by commission, what notice is necessary, the form thereof, and of the oath	234, 235	bailable and how bailed	107
Caption of	ibid.	Executed, and bail-bond given	
Caption of Quakers	236	how to proceed	103
Of a corporation	ibid.	For costs not bailable	107
Of a Peer or Peerefs of the realm	ibid.	With proclamation	113
Taken by a special commission	238	Form thereof	114
Of infant, idiot, or lunatick	241	Bill original.	1
Jurata of an infant's answer by guardian	ibid.	Framing and constituent parts	
Caption of an infant's answer by his guardian	248	of	14
Referring for scandal and impertinence, and expunging same	254	Scandal and impertinence	15
Exceptions thereto within what time to be filed	260	Engrossing and filing	10
To amended bills	279	Several kinds and distinctions of	ibid.
Further answers	ibid.	Amended	21
Insufficient	264	Of interpleader	26
		Of certiorari	28
		To perpetuate testimony	32
		Of discovery	36
		Supplemental	42
		Supplemental in the nature of a bill of revivor	45
		Of revivor	46
		Of revivor and supplement	51
		Cross	52
		S f	Of

TABLE OF PRINCIPAL MATTERS.

Of revivor	Page 56
In the nature of bill of revivor	66
Impeaching decrees upon the ground of fraud	67
To carry decrees into execution	68
Original in the nature of bills of revivor	69
Original in the nature of supplemental bill	71
Filed by the particular direction of the court	72

Cheat

Against signing a decree previous to the enrollments thereof, how entered, and within what time	444
---	-----

Certiorari

Where granted	581
Form and return thereof	582

Certificates

Of appointing a guardian to an infant	247, 250
---------------------------------------	----------

Commission

Of rebellion	116
Proceeding against commissioners refusing to make a return thereon	119
How to take bail thereon, and form of the bond, and in what cases it may be taken	ibid.
Form of the writ	120
Dockett thereon	121

To take answer where necessary	Page 229
--------------------------------	----------

How to proceed if defendant will not name commissioners *ibid.*

To take an answer	231
-------------------	-----

To take a Quaker's answer	232
---------------------------	-----

To take the answer of a corporation	233
-------------------------------------	-----

Special to take a plea, answer, or demurrer	238
---	-----

To assign a guardian for an infant	242
------------------------------------	-----

To assign a guardian, and to take the answer of the infant by such guardian	243
---	-----

To take a plea, answer, or demurrer of an infant by his guardian already assigned	245
---	-----

To assign a guardian for an infant, the guardian formerly assigned being dead	246
---	-----

To examine witnesses	297
----------------------	-----

Joining in commission and striking names	298
--	-----

Form of	299
---------	-----

Oath of commissioners, and clerks	301
-----------------------------------	-----

When returnable	302
-----------------	-----

Who is entitled to carriage thereof in the first instance	<i>ibid.</i>
---	--------------

When defendant may sue out one	<i>ibid.</i>
--------------------------------	--------------

When defendant may have the carriage of it	303
--	-----

Duplicate thereof when necessary, and in what cases	303
---	-----

Neglected to be executed, who bears the expence	<i>ibid.</i>
---	--------------

Joining and naming commissioners, and striking names	304
--	-----

How

TABLE OF PRINCIPAL MATTERS.

How to proceed if adverse party refuse to strike names	Page 304
Ex parte	ibid.
Who may be commissioners	ibid.
Within what distance from Lon- don issued	305
To examine witnesses abroad, how and when obtained	ibid.
When to be made returnable	306
How many commissioners in- serted therein	307
Form thereof	308
To examine de bene esse, in what cases obtained	311
To examine de bene esse restricted to the witnesses named therein	313

Commitment

Of a witness for not attending to be examined	329
--	-----

Contempt. Vide Process to enforce Appearance.

Cross Bill. Vide Title Bill.

Where a defendant is in con- tempt for want of answer, and puts in an insufficient answer, process need not begin de novo	267
--	-----

Costs

Where no bill filed	96
Of scandal and impertinence	14
Of attachment executed or not	106
Of attachment with proclama- tions executed or not	115
Of commission of rebellion	117

For not entering demurrer	Page 212
Upon allowing demurrer	213
For not entering plea	222
For over-ruling plea	224
Of first, second, third or fourth insufficient answer in town or by commission	264
Subpœna for	265
Attachment for	103
Allowing or disallowing excep- tions	276
Hearing on bill and answer	417
Of the day on cause going off for want of parties	416
Of witnesses to be borne by par- ties producing them	359
To be tendered or paid to wit- nesses before examination	328

Decree

How drawn by the register	430
Passed and entered	431
Nisi, or unless cause	433
Nisi made absolute on affidavit and certificate	436
Manner of shewing cause against making the same absolute	437
Who are bound by the decree	440
Who are not bound	441
Signing and inrolling decrees	442
Caveat against signing decrees in order to their inrollment	444
Inrollment of decrees	445

Defence.

To bills	146
S f 2	Persons

TABLE OF PRINCIPAL MATTERS.

Persons capable and incapable by
themselves of defending a suit
Page 147

Demurrer

Framing in general and of argu-
ing 148
To the first species of bill and
bills of discovery merely 150
To relief generally, including a
demurrer to discovery *ibid.*
Because the plaintiff is alone in-
capable of instituting a suit
151
For want of parties *ibid.*
For want of privity between the
plaintiff and defendant 152
For want of title in the plaintiff
153
Because the plaintiff shews an un-
lawful claim 154
For want of equity in the plain-
tiff's case *ibid.*
Because the plaintiff hath remedy
at law 155
Because the plaintiff hath remedy
in the ecclesiastical court 156
Because the relief prayed is a-
gainst a proceeding at law upon
a criminal prosecution, or a
mandatory writ *ibid.*
Because the plaintiff ought to
have established his right at law
before filing his bill *ibid.*
Because the plaintiff's demands
several things of different na-
tures against several defendants
by same bill 157
Because the bill is brought for

part of a matter only *Page*
157

Because the bill shews no claim
of interest in the defendant 158
Because the bill shews no ground
to charge the defendant with
the plaintiff's demand 159

Demurrers

To discovery only 159
Because the discovery may make
the defendant liable to pains
and penalties 160
Because it will make the defend-
ant liable to forfeiture 161
Because the discovery is imma-
terial 162
Because the plaintiff shews no title
to the discovery *ibid.*
Upon a mistake or inaccuracy in
a bill 163
To bills of discovery merely 159

Demurrer

Peculiar grounds of, to the seve-
ral other species of bills 164
To a bill of interpleader 164
Certiorari bills *ibid.*
To bills to perpetuate testimony
ibid.
Bills of revivors and supplement,
and bills in nature of bills of
revivor and supplement 165
Cross bills 166
Bills of review, and in nature of
bills of review, and bills to im-
peach decrees on the ground
of

TABLE OF PRINCIPAL MATTERS.

of fraud, or to carry decrees into execution	Page 166
Bills filed by the direction of the court	167
Bills irregularly exhibited	ibid.
Words of course preceding and including	168
Filing and arguing	209

Deposit

On filing exceptions to an answer	271
-----------------------------------	-----

Depositions

Scandalous and impertinent, how referred and expunged	394
Amended	399
Translation of	400
Words of course preceding depo- sitions at the Examiner's office	401
Words of course preceding de- positions by commission	402

Disclaimor.

208

Distringas.

140

Duplicates

Of commissions to examine	303
---------------------------	-----

Entering Decrees

343

Nunc pro tunc	432
---------------	-----

Evidence

What may be received at the hearing	422
--	-----

Examination

Of witnesses	Page 313
Different modes of	316
In town at the Examiner's office	323
Of unwilling witnesses who re- fuse to attend	326, 329, 330
Of a witness in prison or sick and unable to attend at the Exami- ner's office	330
By commission	334
Notice of executing commission to examine	335
Commissioners summons	336
Method of proceeding on a com- mission to examine witnesses	342
Commissioners oaths and clerks oaths, form of	301
Commissioners duty	348
Witnesses oath	347
How books, &c. are to be produced by subpoena duces tecum	349
Exhibits how indorsed	351
Manner of returning commission and depositions	352
How commission is to be sent to the office	351
Adjournment how made	353
Commissioners or their clerks ex- amined	356
Examining defendant	ibid.
Not to be executed in term time without leave	358
Expences of commissioners, their clerks and witnesses	359
Of witnesses resident abroad by commission	361

TABLE OF PRINCIPAL MATTERS.

Notice thereof upon commissioners
or agent named by the party
Page 362

Certificate in what manner witnesses not of the Christian religion have been examined 364

To perpetuate testimony 365

De bene esse 368

In what cases admitted 369

No-witnesses examined but those named in the order *ibid.*

Viva voce at the hearing *ibid.*

In what cases admitted 370

To prove exhibits only *ibid.*

Process to compel witnesses to attend to be examined at the hearing 371

To the credit or competence of a witness already examined 373

Filing objections 374

In town or by commission 377

Exceptions

To answer 259

How drawn, engrossed and filed *ibid.*

Within what time to be filed 260

What time to answer exceptions in town or country 261, 266

When to be referred *ibid.*

Where defendant submits 262

Referred, and proceedings thereon before the master *ibid.*

Shewn for cause against dissolving an injunction 264

Allowed proceedings to compel a better answer 265

Defendant submitting is not pre-

cluded from insisting upon the same matter again *Page 268*

Lie not to plea and answer till plea argued unless plea and answer are distinct 269

Lie not to demur and answer till demurrer argued, unless demurrer is distinct from the plea *ibid.*

Words of course preceding and concluding 270

To reports 271

How drawn, engrossed, and set down to be argued *ibid.*

Deposit made thereon *ibid.*

No time fixed by the course of the court for filing the exceptions 272

Set down and argued in court 275

Words of course preceding and concluding 279

Exhibits

How to be proved 439

May be proved viva voce at the hearing 370

Feme Covert 2, 3

Plaintiff marrying abates the suit 46

Defendant marrying does not abate the suit *ibid.*

Plaintiff's husband dying abates the suit 47

Filing Bills. Vide Title Bills.

Guardian

TABLE OF PRINCIPAL MATTERS.

Guardian	
To infants ;	Page 146
Ad litem how appointed	249
Habeas Corpus	109
How directed	ibid.
When obtained	111
How served	113
Cum causis where necessary	110
Alias Pluries	ibid.
Alias Pluries	111
Form thereof	112
Prisoner in a county gaol removed	113
Prisoner may remove himself to the Fleet prison	ibid.
Hearing	412
And publication cannot be of the same term	384, 403
Setting down cause for	ibid.
Subpœna to hear judgment	408
Upon bill and answer	416
When plaintiff does not appear	418
When defendant does not appear	419
Where there are not proper parties	420
What evidence admitted at the hearing	422
Judges.	2, 146
Impertinence and Scandal.	14, 197
To be expunged	254

Infant.	Page 2, 146
How to sue and defend	3, 241
To proceed against an infant for want of appearance	98
Cannot be foreclosed without a day to shew cause	433
May make a new defence and put in a new answer six months after he comes of age	439
Informations.	73
Injunctions	583
To stay proceedings at law	585
To stay waste	587
To yield up or quit possession of lands	589
To quiet possession before hearing	590
Against continuing a nuisance	591
To prevent multiplicity of suits	ibid.
In ejectment cause	ibid.
Staying buildings and stopping ancient lights	592
On patents	ibid.
In what cases injunctions have been denied	ibid.
Serving them	595
Continuing them	596
Dissolving them	597
Irregular injunctions	599
Perpetual	600
Order for injunction on a dedimus	602
Docket thereon	ibid.
Order for an injunction on an attachment	603
S f 4	Docket

TABLE OF PRINCIPAL MATTERS.

Docket on order for an injunction on an attachment	Page 604
The form of an injunction	605
On a dedimus	606
On an order for time	ibid.
On an insufficient answer	ibid.
On an attachment for want of answer	ibid.
To stay waste	ibid.
Special to stay execution till hearing	607
Special to stay copying, engraving, &c. and selling prints	608
To deliver possession of lands pursuant to a decree	609

De exeat Regno

Writ of	611
When granted	612
Form thereof	613

Notice

What necessary on the execution of a commission to examine	335
On the execution of a commission to take plea, answer, or demurrer	234

Oath

Required of the due service of warrants before the master will proceed ex parte	395
---	-----

Oaths

Of the commissioners and clerks	Page 301
---------------------------------	----------

Original

Bill	1
------	---

Parties

To the suit	2
-------------	---

Paying

Money into court	494
------------------	-----

Petition

To accept plaintiff's bill nunc pro tunc	501
For six weeks time to answer in a country cause	502
For a month	503
The like	504
For three weeks	ibid.
For a month in a town cause	505
For three weeks	506
For a fortnight	ibid.
For further time upon special circumstances	507
For further time after the several orders obtained	508
For plaintiffs to give security to answer costs and for a month's time to answer	510
After an attachment for a dedimus	mus

TABLE OF PRINCIPAL MATTERS.

mus, and a month's further time	Page 511	To amend bill on payment of costs	Page 529
For a commission after a serjeant at arms	512	For plaintiff to dismiss his bill with costs	530
To be discharged out of the custody of the serjeant at arms	513	To withdraw a plea and demurrer	531
To take an answer de novo and amend the caption and itay process	514	To receive exceptions	ibid.
To discharge defendant from the Fleet prison by consent of plaintiff	515	The like	532
For six weeks time to answer amendments	516	The like	533
To put in an answer without oath	ibid.	To refer exceptions	534
For a feme covert to answer separate from her husband	517	For commission to examine de bene esse before appearance	535
For a commission to assign a guardian, and to take defendant's answer by such guardian	518	For commission to examine de bene esse before issue joined	536
For a special commission, &c.	519	For subpoena to rejoin and for a commission to examine witnesses	537
For a letter missive	520	For commission to examine plaintiff not having sued out a commission	538
For a subpoena returnable immediate	521	To join and strike commissioners names, or in default a commission ex parte	539
For process of contempt returnable immediate	ibid.	For his honor to strike commissioners names, plaintiff refusing to do so	540
For a plaintiff to be admitted in formâ pauperis	522	To alter a commissioner's name and for liberty to renew the same and time to return it	541
For a defendant to be admitted in formâ pauperis	524	To add an interrogatory or two but not to examine any witness already examined	542
To appoint a day for an absconding defendant to appear	525	To be at liberty to exhibit one or more interrogatories to prove accounts after publication passed	543
For a habeas corpus cum causis to remove defendant to the Fleet prison	526	To execute a commission in term time	544
To renew a sequestration	527		To
To withdraw a replication and amend bill with costs	528		
To amend bill by adding a defendant	529		

TABLE OF PRINCIPAL MATTERS

To examine a defendant	P. 345	directions on a master's report	
To enlarge publication	546		Page 558
To enlarge publication	ibid.	To adjourn a cause	559
To enlarge publication	547	To set down a cause for rehear-	
To enlarge publication so as not		ing, on defendant's default of	
to hinder setting down the		appearance at the hearing	ibid.
cause, and for an original and		To bring on two causes to be	
cross cause to come on together		heard together	560
	548	To restore a cause after it has	
To enlarge publication and for a		been struck out of the paper	
commission to examine witnesses			561
	549	To set down a cause on the equity	
For a commission to examine wit-		reserved after issue at law	ibid.
nesses after cause set down	550	To set down special matter upon	
To serve a subpoena to hear judg-		the master's report	562
ment on a clerk in court, de-		To set down a cause on the equity	
fendant absconding	551	reserved by the decree	563
To prove an exhibit viva voce at		To set down a cause on the equi-	
the hearing	ibid.	ty reserved on a case for the	
That the answer in one cause may		opinion of the Court of King's	
be read at the hearing of an-		Bench	564
other	552	To refer an examination to a	
That depositions in one cause may		master, and to tax costs upon	
be read, and made use of at		the breach of an order	565
the hearing of another	553	For a return of a writ of inquiry	
To examine witnesses after pub-			566
lication upon the usual affida-		That service of an order nisi on	
vit	ibid.	the clerks in court, may be	
That deposition de bene esse may		good service	567
be opened, published, copied		That serving writ of execution	
and sealed up again	554	on clerk in court of absconding	
To set down a plea to be argued		defendant, may be good ser-	
	555	vice on him	568
To set down a demurrer to be		To enter a decretal order nunc	
argued	556	pro tunc	569
To set down exceptions to a mas-		To sign and inrol a decree nunc	
ter's report	557	pro tunc	ibid.
To set down a cause for hearing		To enlarge time for payment of	
ibid.		money	570
To set down a cause on further			For

TABLE OF PRINCIPAL MATTERS.

For an infant trustee to convey

Page 571

For a person come of age to enlarge time for shewing cause against a decree 572

For a solicitor to deliver his bill and to tax the same 573

To tax solicitor's bill delivered 575

To vacate recognizance of receiver and his sureties *ibid.*

For further adjourning cause 578

For licence for the king's counsel to plead against the crown with the order thereon 579

Pleas 170

To the jurisdiction of the court *ibid.*

To the person of the plaintiff or defendant 172

That the plaintiff is outlawed *ibid.*

Excommunicated 173

A popish recusant *ibid.*

Attainted 174

An alien *ibid.*

Incapable of instituting a suit alone *ibid.*

That the plaintiff or defendant is not such person as is alledged in the bill *ibid.*

In bar of the suit 175

In bar to the first species of bills, and bills of discovery merely *ibid.*

Of matter recorded, or as of record in the court itself, or some other court of equity Page 175

A decree or order *ibid.*

Another suit depending 176

In matters in pais only 178

Of matters in pais to relief and which something extend to discovery also *ibid.*

As, want of title in the plaintiff *ibid.*

Want of parties to the suit 179

A stated account *ibid.*

An award 180

A release *ibid.*

A will *ibid.*

Purchase, mortgage, or settlement for valuable considerations without notice *ibid.*

Of matter in pais to discovery only 182

That the discovery may subject the defendant to pains and penalties 183

That it would subject him to forfeiture *ibid.*

That it would betray the confidence reposed in him as counsel, attorney or arbitrator 184

Of matters of record, or in the nature of matters of record in some court, not being a court of equity either alone, or joined with matters in pais *ibid.*

A fine and non-claim 185

A recovery 186

A judgment at law, or sentence of some other court *ibid.*

A

TABLE OF PRINCIPAL MATTERS.

A statute	Page 187	Manner of returning the com-	
In bar to the several other species		mission, and the oath required	
of bills	189	from the party having the car-	
To bills of interpleader	ibid.	riage of it	Page 221
Bills to perpetuate testimony of		In abatement not to be returned	
witnesſes	ibid.	by commiſſion	222
Bills of revivor and ſupplement,		How entered and within what	
and bills in the nature of bills		time	ibid.
of revivor and ſupplement	190	Form of entering ſame	ibid.
Croſs bills	ibid.	Of a former ſuit depending need	
Bills of review and in the nature		not be ſet down with the regiſ-	
of bills of review to impeach		ter	ibid.
decrees on the ground of fraud		Setting down to be argued	224
	ibid.	Coſts on over-ruling plea	ibid.
Bills to carry decrees into execu-		Proceſs to obtain coſts	ibid.
tion	191	To ſtand for an answer with li-	
Bills filed by the direction of the		berthy to except	ibid.
court	ibid.	Ordered to ſtand for an answer	
Framing pleas in general	192		ibid.
Averments in pleas	ibid.	Admitted if plaintiff reply there-	
Supported by answers	193	to, or amend his bill	225
Arguing pleas	194		
Pleas which are not uſually ar-			
gued	195		
Put in upon oath and pleas filed			
without oath	ibid.		
Words of courſe preceding and			
concluding pleas	196		
Filing and arguing	214		
Muſt be filed in eight days, or			
an order for time obtained	216		
Cannot be taken upon a com-			
mon dedimus to take an an-			
ſwer	218		
Manner of ſwearing and filing			
pleas	219		
How taken by commiſſion in a			
country cauſe	220		
Caption of a plea by dedimus	221		
Return of the dedimus	ibid.		

Proceſs

To enforce appearance, and of contempt 99

Privilege

**How to proceed againſt a peer or
peereſs of the realm** 81
**Againſt a member of the Houſe
of Commons** 87

Prochein amy.

**Any perſon without conſent of
the infant** ibid.

Liable

TABLE of PRINCIPAL MATTERS.

Liable to costs of suit *Page* 3

Proclamations

Attachment with 113

Publication 378

How it passes *ibid.*

Rules how entered and when 379

When defendant may give a rule
to produce 380

Rule to pass or order to enlarge,
should be served upon the ex-
aminer 381

Of compelling publication, when
adverse party neglects to obtain
an order to enlarge *ibid.*

How enlarged 382

When affidavit necessary to en-
large it 383

And hearing not to be of the same
term unless by consent or or-
der 384

Of depositions in perpetuum rei
memoriam 387

Depositions de bene esse 388

Of deposition de bene esse, re-
fused in the life time of the
witness 391

Enlarged until answer to a cross
bill comes in *ibid.*

Rebellion

Commission of 116

Houses may be broken open to
execute it *ibid.*

May be executed in the verge of
the court of the palace at *West-*
minster; may be executed on a
sunday *Page* 116

Directed sometimes to the She-
riff, generally to commissioners
ibid.

In what cases bailable 117

Bail-bond thereon 119

Commissioners duty 118

Return thereto how made *ibid.*

Form of the commission 120

Docket thereon 121

Receiving money 495

Reference

Of exceptions to an answer for
insufficiency 262

Of bills, answers, depositions, &c.
for scandal or impertinence 254

Rejoinder

And joining in commission 291

Rejoinder refused *ibid.*

Ancient form of rejoinder 292

Subpœna to rejoin present prac-
tice therein 293

Rejoining gratis *ibid.*

Replication must be filed before
subpœna to rejoin issues *ibid.*

Issuing out and service of subpœ-
na to rejoin 294, 295, 296

Service thereof upon the clerk in
court must be by order for that
purpose *ibid.*

Form of subpœna to rejoin 295

No subpœna to rejoin, if defen-
dant rejoins gratis, or parties

TABLE OF PRINCIPAL MATTERS.

to commission by consent
Page 396

Replication 283

Special and the subsequent pro-
ceedings anciently used 284

Form thereof 285

Special form thereof 286

In what cases necessary 289

Rebtor: Vide Bill.

Rebtor Vide Bill.

Rules

To produce witnesses 299

To pass publication 378

How entered 379

When same expire 379

When to be given *ibid.*

Form thereof 380

Scandal and Impertinence 14

How expunged 255

Sequestration 127

Form thereof 136

Commissioners duty and fees 139,
140

Where to be discharged as to a
person who desires to be ex-
amined pro interesse suo 131

What liable 129

If Defendant be in prison, his
lands may be sequestered 129

Issuing as *mesne process* deter-
mines by the death of the party,
secus after a decree Page 132

From what time it binds *ibid.*

Sequestrators answerable for their
own acts 138

Sequestrator cannot sell without
leave of the court 135

First process against a peer of
the realm 130

Or a member of the House of
Commons *ibid.*

Serjeant at Arms 123

Next process to commission of
rebellion, and why *ibid.*

Subpoena

To appear and answer 75

When first invented *ibid.*

Returnable 77

Form thereof 78

Returnable immediate *ibid.*

Service thereof 83

In injunction causes 76

To make a better answer 265

Service thereof 266

For costs 257

Service thereof 258

To rejoin and join in commission
295

Service thereof 296

To testify before the examiner
326

Service thereof 327

To testify before commissioners
339

Service

TABLE OF PRINCIPAL MATTERS.

Service thereof	Page 340
Duces tecum	341
Service thereof	342
To testify viva voce in court	371
Service thereof	372

Summons for Witnesses

By the examiner	328
By commissioners	336

Supplemental Bill Vide Bill.

Witnesses 313

Anciently examined by the judge	314
Of the court on interrogatories	314
Manner of examining in town	322
Crosses examined	323
Brought in by subpœna	326

Disobeying subpœna how com- pelled to attend	Page 329
In prison or sick how examined	330
Manner of examining by com- mission	337
Neglecting or refusing to attend compelled by subpœna	338
Having deeds, &c. in his custody how compellable to produce them	340
How paid	359
Witness abroad how examined	361
Examined in perpetuam rei me- moriæ	365
Examined de bene esse	368
Examined vivâ voce at the hear- ing	369
How compellable	371
Examination to credit	373

F I N I S.



